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CURRENT EVENTS.

THE NEW YEAR.—In opening a new volume and a new year, we are glad to avail ourselves of the opportunity to express thanks to our subscribers for their kind appreciation of our past labors. We are glad to think that during the past year the JOURNAL has won the approbation of its subscribers. We are satisfied that the system upon which the JOURNAL is conducted in its various departments is entirely satisfactory to nearly or quite all of our subscribers, and as we design making no change in this respect, we can only promise that our utmost exertions will be devoted to making the JOURNAL for the coming year even more valuable to the profession than it has been in the past.

TELEPHONE LAW—FEDERAL JURISDICTION—PATENT LAW.—"Our modern improvements" besides contributing very greatly to the convenience, comfort and wealth of this generation, have immensely augmented the volume of the current law of the land. To our admirable railroad system we owe the great increase of "carrier law," the law of corporations, and except a very small portion, the immense body of the law relating to negligence and contributory negligence. Whether this great increase of the law is a blessing, either overt or in disguise, is a question which we will not discuss. The telegraph, too, has contributed its quota to the law, and now comes to the front the telephone, the latest and probably not the least important of modern inventions.

In our next number we will publish a very important decision relative to telephone law rendered within a few days past by the Supreme Court of Missouri. In our present number will be found the opinion of Mr. Justice Miller, in the Bell Telephone case, delivered in the Supreme Court of the United States affirming the jurisdiction of that court to order the cancellation of patents for inventions, the issuance of which was obtained by fraud. It is almost unnecessary to say that this opinion of Mr. Justice Miller, like all his opinions, is able and exhaustive. He demonstrates beyond question the utter fallacy of the theory that a patent for inventions issued by the patent office of the United States is a fixed fact as utterly unchangeable as the laws of Medes and Persians. Such seems to have been the view of the United State circuit court for the district of Massachusetts, which held that the government of the United States having once issued a patent is bound by it for evermore, no matter how fraudulent and corrupt had been the conduct of the parties who had issued and obtained it. We will not, however, remark further on that question, but refer our readers to the opinion of Mr. Justice Miller, who treats the subject with far more ability than we can.

We take this occasion to repeat our confident opinion that there is no branch of national legislation which needs more thorough revision and reorganization than the law relating to patents for inventions. There seems to be no sort of system or general principle to which may be referred questions of the validity and operation of a patent. Everything seems to depend upon the discretion and judgment primarily of the commissioner of patents, and then upon those of the United States circuit and district judges, each case depending upon its own facts utterly irrespective of general principles. In the innumerable actions for infringement of patents to be found in the reports of federal courts, numbers of patents are declared "void for want of novelty" or other patentable quality, and yet it is very rare that any definition of patentability can be found in any of the cases. We suppose that, to a very great extent, this indefiniteness is a necessary incident of the subject-matter, and that in very many cases the questions presented and adjudicated are questions of fact, but we should suppose that in the many years that have elapsed since this line of litigation was inaugurated there would have been evolved in the opinions of courts a sufficient number of general principles to be formulated into something resembling a code.

NOTES OF RECENT DECISIONS.

HABEAS CORPUS—CHINESE EXCLUSION ACT—BILL OF ATTAINDER.—We usually confine our notes in this department of the JOURNAL to cases decided by courts of the last resort, but we owe no apology to our readers for departing from our rule by commenting on an important decision recently made by Judge Deady of the United States district court for Oregon.[1]

The facts were that a Chinese woman, born in San Francisco in 1866, and therefore a citizen of the United States, was a passenger on a steamer from a port in British Columbia for Portland, Oregon, where she was not permitted to land, but was "restrained of her liberty" by the master of the steamer. Upon the hearing of her petition for a writ of *habeas corpus*, her nativity and citizenship were established to the satisfaction of the court, which held that a person born within the United States is a citizen thereof, both at common law and under the XIVth Amendment of the constitution of the United States, and as such, is entitled to free locomotion within the national territory, and to depart from and return to the United States at his (or her pleasure).[2]

It is well known that on the Pacific slope the popular sentiment is that "the Chinese must go," and under the recent Chinese exclusion act it is added that they must go to stay. The bill forbids any Chinese immigrant who has left the United States to return without a return certificate, and it was under this act that the landing of the Chinese woman was prevented. Judge Deady demonstrates that the Chinese exclusion act does not apply to the petitioner or any other American citizen; if it did so it would conflict with that clause of the constitution[3] which forbids congress from passing any bill of attainder. He further says:

"A legislative act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, and thereby deprive him of the right to live in the country, for any cause or no cause, or because of his race or color, is a bill of attainder, within the clause of the constitution of the United States, prohibiting the passage of such bills, and is therefore void."

[1] *In re* Yung Sing Hee, 36 Fed. Rep. 437.

[2] *Ex parte* Chin King, 35 Fed. Rep. 354; *In re* Look Tin Sing, 10 Saw. 353; 21 Fed. Rep. 905.

[3] Article 1, § 9.

DECLARATIONS ON INSURANCE POLICIES.

I. AVERMENTS AS TO
1. Status of Plaintiff and Defendant.
2. Consideration.
3. Continuance of Policy.
4. Description of Property.
5. Loss.

II. GENERAL CONCLUSIONS—CONDITIONS—SETTING OUT POLICY.

III. SPECIAL CONDITIONS AS TO
1. Application.
2. Notice; Proofs of Loss; Magistrates' Certificates.
3. Interest; Title; Ownership.
4. Occupancy.
5. Demand; Amount Due.
6. Other Insurance; Abandonment; Repair.
7. Limitations.

IV. CURE OF ERRORS IN DECLARATION.

It is rare that declarations or complaints on insurance policies are correctly drawn. Almost always inaccuracies are found, such as either necessitate demurrers and amendments, or produce embarrassments lasting throughout the litigation. These considerations appear to the writer to make it worth while to state the essential elements of the complaint or declaration in such actions, and to indicate the points wherein error is likely to arise.

I. AVERMENTS AS TO.—1. *Status of Plaintiff and Defendant.*—It is so easy to identify and describe the plaintiff and defendant in an action on an insurance policy that not much need be said on this point. Both parties should be named; the omission, without excuse, of the christian name of one of them will be specially demurrable.[1] If the declaration is against a mutual company or society plaintiff should aver membership therein.[2] One person renewing a policy, originally made to two, may declare on it alone.[3] But the name of the person for whose use the action is brought, need not be given.[4] A wife suing need not allege that the husband

[1] Sturge v. Rahn, 4 Exch. 646.

[2] Manlove v. Naylor, 38 Ind. 424; Same v. Naw, 39 Ind. 289; Same v. Bender, 39 Ind. 371; Whitman v. Mason, 40 Ind. 189; Hashagan v. Manlove, 42 Ind. 330; Teppecanoe Twp. v. Manlove, 39 Ind. 249; Downs v. Hammond, 47 Ind. 131.

[3] Lockwood v. Middlesex I. Co., 47 Conn. 553.

[4] Hayes v. Virginia M. P. A., 76 Va. 225; Mintes v. Thompson, 2 East, 385.

did not direct payment to be made to any other person than to herself.[5] The corporate capacity of the defendant (or plaintiff, if it be a corporation), should be averred.[6] But it is not necessary to aver compliance with the statute authorizing the company, defendant to do business in the State.[7] In Kansas, the non-residence of the corporation defendant is sufficiently alleged by averring that defendant is a foreign corporation created and existing under the laws of Connecticut, with its principal office in the city of Hartford in that State.[8] Nor is it necessary, specifically, to allege that insurer's charter authorized insurance against loss by fire where the complaint alleges authority to insure good and chattels—this must include all kinds of insurance.[9]

2. *Consideration.*—It is an elementary rule of law, which is generally observed, that a consideration must be alleged.[10] When dividends are relied upon as constituting payment of consideration their sufficiency must be averred.[11] The order and time of an assessment relied upon must be averred.[12]

3. *Continuance of Policy.* — It must be shown that the policy was in force at the time of the loss.[13] It is well to aver the dates of the policy and of the loss under a *videlicet*, else a variance may be fatal.[14]

4. *Description of Property.*—The property covered should be accurately described. In a suit on marine policy, it is enough to show that divers goods were put on board and the policy was made on said goods.[15] It must be averred that the property was in the building or ship lost.[16] But the description need only be given by apt words reasonably applicable to the property. Thus, in insurance on "goods," it was held enough to declare that the defendant became an insurer of the "premises" in the policy mentioned.[17]

5. *Loss* by the misfortune insured against in the policy must be fairly stated. A fair reasonable allegation is all that is necessary in this particular. Thus, it has been held that an allegation of loss from "one of the perils issued against" was enough.[18]

Where the policy excepted loss caused by fire which should ensue from the falling of a building: *Held*, sufficient to aver that the loss was caused by fire and not by the falling of any building.[19] But an averment of loss, "by any reason of a fire taking place in the cellar of said premises," was held insufficient because it failed to State that the goods insured were injured or destroyed by fire.[20]

II. GENERAL CONCLUSIONS; CONDITIONS; SETTING OUT POLICY.—Reasoning from the analogy between contracts of insurance and ordinary contracts it would seem sufficient to declare by describing the parties, averring the making and continuance of the policy, describing the goods and averring the loss, together with the demand and the refusal to pay on the part of the company. And there are decisions which appear to sustain this conclusion. A general count has been held good in New Hamsphire.[21] A count for money had and received has been held sufficient to sustain an action on a policy.[22] And probably these decisions are sound as to the particular cases to which they are applied.

Declarations drawn in accordance with the foregoing observations would be comparatively brief, simple documents, and such are usually the first declaration filed in these cases. The trouble with them lies in the fact that the policy of insurance is a conditional contract, a fact which is either wholly overlooked or the pleader puts in a general averment that the plaintiff has performed all the condition on his part to be observed, leaving breaches of condition to be set up in defense.

So far as provisoes and breaches of conditions subsequent are concerned it is safe pleading to leave the defense to set them up by pleas. The rule is that defenses need not be negatived.[23] Facts which defeat part of plaintiff's claim under special provisions of

[5] Laudenschlager v. N. W. Assn., 30 N. W. Rep. 427.
[6] Texas, etc. Co. v. Davridge, 51 Tex. 244.
[7] Germania Ins. Co. v. Curran, 8 Kan. 5.
[8] Æ na Ins. Co. v. Koons, 26 Kan. 215.
[9] West Mass. Ins. Co. v. Duffey, 2 Kan. 347.
[10] Texas, etc. Co. v. Davridge, 51 Tex. 244.
[11] Bulger v. Washington L. I. Co., 63 Ga. 328.
[12] Atlantic, etc. Co. v. Young, 38 N. H. 451.
[13] Schroeder v. Trade Ins. Co., 12 Bradw. (Ill.) 651.
[14] Ketchum v. Protection Ins. Co., 1 Allen (N. B.), 136; Guschnor v. Keith, 9 Bradw. (Ill.) 416.
[15] DeSymons v. Johnston, 5 B. & P. 77.
[16] Todd v. Germania F. I. Co., 1 Mo. App. 472.
[17] Houghton v. Ewbank, 4 Camp. 88.
[18] Gartside v. Orphans' Ben. I. Co., 62 Mo. 322.
[19] Ferrer v. Home Mut. Ins. Co., 47 Cal. 416.
[20] Rode v. Rutgers' F. I. Co., 6 Bosw. 23.
[21] New Hampshire, etc. Co. v. Hunt, 30 N. H. 219.
[22] Metropolitan, etc. Co. v. Drach, 101 Pa. St. 278.
[23] Phœnix Ins. Co. v. Moog, 78 Ala. 284; Simmons v. Ins. Co., 8 W. Va. 474.

the policy need not be alleged.[24] Conditions subsequent need not be set out, nor performance thereof averred.[25] It is not necessary to aver that the loss did not happen from invasion, etc. These are provisoes for the benefit of the insurer who must set them up in defense.[26] The plaintiff need not negative breach of conditions prohibiting the use of certain things on the premises of the insured.[27] Nor is an affidavit of defense necessary.[28] And the court will liberally interprete averments concerning provisoes and defenses if made. Thus, "accepted risks" was construed "excepted risks."[29]

But as to the condition precedent to the right of action—and it is as to them that declarations are usually defective or insufficient—a different rule exists. They are not to be ignored and left for the defendant to set up in defense with proper averments as to their breach. It is plaintiff's duty to set them out, and to aver performance on his part. I know of no contract that contains so many or such subtle conditions precedent as insurance policies. They are rarely, if ever, strait, unequivocal agreements to pay losses upon their occurrence; but are contracts with an "if" writ large and all over them. The loss will be paid *if* a peculiar notice thereof is given, *if* peculiarly formal proofs of loss and magistrates, certificates are put in, *if* the various warranties as to title, condition, etc., of the property are true, *if* the demand for payment be made not earlier than a certain named time, etc., etc. These various "ifs" arise out of as many conditions precedent which are generally ignored by the pleader but which should be set out with specific averments of performance. The general rule as to this is thus given by Chitty: "If there be any thing specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated."[30] Following this rule a federal court in one case says: "By this policy of insurance the company agrees to pay the loss only upon the conditions that the plaintiff do certain things which the company deems essential for its own protection. It must appear, therefore, that each and all or these acts, as set out in the contract, have been discharged or some legal excuse for non-performance given before the plaintiffs have a right of action."[31] In Illinois, the court lays down the following rule as to averring conditions in the policy: "The policy with the conditions annexed constitute an entire contract, and in declaring upon the contract, it, or a sufficient portion of it to show a right of recovery, must be set out either in terms or in substance. This is not like suing on a formal bond at common law, where the plaintiff might simply count on the bond and leave the defendant to set up the condition and plead performance. But in a case of this character, money only being payable upon the assured performing certain acts, all such precedent acts should be set out and their performance averred. But all conditions subsequent to the right of recovery, and all acts to be done by the company in discharge of their liability, may be omitted and left to be set up as a defense."[32]

It is, therefore, desirable to set out the policy *in hæc verba* so that every condition precedent may be shown. In Illinois, the statute requires a copy of the policy to be filed as part of the declaration.[33] But it may be filed as an exhibit with the declaration and made part of it by proper allegation,[34] although in Mississippi, it was decided that exhibits annexed to a bill cannot be examined for the purpose of determining whether a demurrer should be sustained or overruled, and is sufficient if the bill itself discloses a *prima facie* right, notwithstanding it fails to state that all the conditions of the contract upon which it was founded have been observed and performed.[35] But while desirable

[24] Pierce v. Charter Oak L. I. Co., 138 Mass. 151.

[25] Forbes v. American, etc. Co., 15 Gray, 249.

[26] Lounsbury v. Protection Ins. Co., 8 Conn. 459; Cornell v. Leroy, 9 Wend. 163; Catlin v. Springfield, etc. Co., 1 Sumn. 434. But, *contra*, see Simmons v. Ins. Co., 8 W. Va. 474.

[27] Hunt v. Hudson River Ins. Co., 2 Duer, 481.

[28] Morton v. Mutual L. I. Co., 12 Phila. 246; Riley v. Mut. Ben. Assn., 2 Chester Co. (Pa.) Rep. 305.

[29] Russel v. St. Nicholas Ins. Co., 52 How. Pr. 459.

[30] 1 Chit. Pl. 985, note 1.

[31] Perry v. Phœnix Assurance Co., 8 Fed. Rep. 643.

[32] Rockford Ins. Co. v. Nelson, 65 Ill. 415. See also Home Ins. Co. v. Duke, 43 Ind. 418; Edgerly v. Farmers' Ins. Co., 43 Iowa, 587; Home Ins. Co. v. Lindsay, 26 Ohio St. 348; Ill. Mut. F. I. Co. v. Marseilles Mfg. Co., 1 Gill. (Ill.) 237.

[33] Commercial Ins. Co. v. Mehlman, 48 Ill. 313. See also Peoria, etc. Co. v. Walser, 22 Ind. 73; Roberts v. Germania Ins. Co., 71 Ga. 478; Indiana Ins. Co. v. Hartwell, 100 Ind. 566.

[34] Northwestern M. L. Co. v. Hazlett, 105 Ind. 212.

[35] Statham v. New York L. I. Co., 45 Miss. 581.

to set out the policy *in hæc verba*, accurate averments of its substance and effect may be sufficient, if none of the essential conditions are overlooked.[36] It is not necessary to aver terms of a written policy in a declaration on a parol contract to insure,[37] and in a count upon a reinsurer's policy the original policy need not be set out.[38]

It is also desirable to make specific averments of performance as to each condition precedent. General averments of performance are not enough.[39] But under the liberal practice allowed in the code States a general averment of performance is considered enough. Thus, in Indiana, it is a sufficient allegation of performance of conditions precedent for plaintiff to aver "that he has in all things observed, performed and fulfilled, all and singular, the matters and things which were on his part to be observed, performed and fulfilled, according to the conditions, form and effect" of the policy sued on,[40] and "duly fulfilled" is equivalent to "performed."[41]

In Alabama, a declaration on a life policy is sufficient if it contains a statement of the policy and an averment that plaintiff has fulfilled all its conditions on his part, and that in a specified way defendant has failed to perform according to its contract.[42]

Let us now examine the cases passing upon averments relating to those conditions in the policy that are most commonly precedent.

III. SPECIAL CONDITIONS.—1. *Application.*—The rule is that if the policy makes the proposals, answers, and declarations made by the applicant a part of it, or are warranties, the complaint in an action on the policy is insufficient unless they are stated therein.[43] But, in Michigan, the contrary has been decided.[44]

In Wisconsin, it has been decided that if the complaint shows that the policy sued upon refers to an application and declares that it was a warranty, it need not set out the terms of the application, or the existence of the facts therein stated, or the performance of the promises therein stated.[45] The court disapprove of Bidwell v. Ins. Co.,[46] and Bobbit v. Ins. Co.,[47] which it says are the strongest cases holding the other way. The grounds upon which they are rested are sufficiently answered by 1 Chitty's Pl. 225, 246, 311, and Gould's Pl. §§ 17, 19, 20, 21; sustaining this view are also a number of other decisions.[48] It is certainly not necessary to set out the application where the representations in it are not warranties.[49]

2. *Notice, Proofs of Loss and Magistrates' Certificates.*—Averments following the language of the policy, that these prerequisites to recovery have been furnished as provided for must be made.[50] An allegation that plaintiff "had fulfilled all the conditions of the policy," will not be sufficient as an averment of furnishing proof of loss.[51] If notice by mail is relied upon it must be averred that it was properly directed, stamped, and placed in the post-office.[52] It is sufficient to aver

[36] Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20. See also Tripp v. Vt. L. I. Co., 55 Vt. 100.

[37] Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372.

[38] Cahen v. Continental Ins. Co., 69 N. Y. 300.

[39] Perry v. Phœnix Assurance Co., 8 Fed. Rep. 643, and authorities *supra*.

[40] American Ins. Co. v. Leonard, 80 Ind. 272.

[41] Ætna Ins. Co. v. Kettles, 81 Ind. 96. See also Richardson v. North Mo. Ins. Co., 57 Mo. 413; Union Ins. Co. v. McGookey, 33 Ohio St. 555; Home Ins. Co. v. Duke, 43 Ind. 418; Continental L. I. Co. v. Houser, 89 Ind. 258; Scheiderer v. Travelers' Ins. Co., 58 Wis. 13; Schobacher v. Germantown, etc. Co., 59 Wis. 86; Mut. Ben. Assn. v. Bowman, 110 Ind. 355; The Dolphin, 1 Flip. 580.

[42] Brooklyn L. I. Co. v. Bledsoe, 52 Ala. 538. See also Massachusetts, etc. Co. v. Kellogg, 82 Ill. 614; Daniels v. Andes Ins. Co., 2 Mont. 78*a*.

[43] Bidwell v. Conn., etc. Co., 3 Saw. 261; Bobbitt v. Ins. Co., 66 N. C. 70; Glendale Woolen Co. v. Ins. Co., 21 Conn. 19; Duncan v. Sun Ins. Co., 6 Wend. 488; Burritt v. Saratoga Ins. Co., 5 Hill, 188; Chaffee v. Cattarangus Ins. Co., 18 N. Y. 376; Battles v. York County Ins. Co., 41 Me. 208; Egan v. Mutual Ins. Co., 5 Denio, 326; Jennings v. Chenango Ins. Co., 2 Denio, 75; Routledge v. Burrill, 1 H. Bl. 254; Worsley v. Wood, 6 Term Rep. 710; Geach v. Ingall, 14 M. & W. 95; Strong v. Rule, 3 Bing. 315; Kennedy v. St. Lawrence Ins. Co., 10 Barb. 285; Murdock v. Chenango Co. Ins. Co., 2 N. Y. 210; Wilson v. Herkimer Co. Ins. Co., 6 N. Y. 53; Tebbetts v. Hamilton Ins. Co., 1 Allen, 305; Ripley v. Ætna Ins. Co., 30 N. Y. 136; 1 Phil. on Ins. (5th ed.), 413, 414, § 756; 1 Arnould on Ins. 578.

[44] Throop v. North Am. Ins. Co. 19 Mich. 423.

[45] Redman v. Ætna Ins. Co., 49 Wis. 431.

[46] 3 Saw. 261.

[47] 66 N. C. 70.

[48] Fishler v. California, etc. Co., 66 Cal. 178; Continental L. I. Co. v. Kessler, 84 Ind. 310. See also Mut. Ben. L. I. Co. v. Cannon, 48 Ind. 264; Commonwealth Ins. Co. v. Monninger, 18 Ind. 352; Penn., etc. Co. v. Wiler, 100 Ind. 92; Northwestern, etc. Co. v. Hazlett, 105 Ind. 212; Guardian, etc. Co. v. Hogan, 80 Ill. 35.

[49] Union Ins. Co. v. McGookey, 33 Ohio St. 555.

[50] Dolbier v. Agricultural Ins. Co., 67 Me. 180; Crescent Ins. Co. v. Camp, 64 Tex. 521; Edgerly v. Farmers' Ins. Co., 43 Iowa, 587; Tayerweather v. Phœnix Ins. Co., 7 N. Y. Superior Ct. 25.

[51] Royal Ins. Co. v. Smith, 8 Ky. Law Rep. 521.

[52] Haskins v. Kentucky, etc. Soc., 7 Ky. Law Rep. 371.

facts implying notice as required.[53]

Of course, there are decisions made under policies where notice, proofs, and certificates are either not essential or have been waived, which hold it unnecessary to aver furnishing of such papers. It has been held unnecessary to aver magistrate's certificate,[54] or that the magistrate was the one nearest the loss;[55] or that the notary who certified the loss was not interested;[56] or to allege due notice and proofs of loss furnished according to the requirements of the statute;[57] or to allege an award made.[58] But every case depends upon the wording of the condition in the policy, determining whether it is a condition precedent to be specially averred or not.

3. *Interest—Title—Ownership.*—It is common to insert a precedent condition in a policy as to the insured being either the absolute, unqualified owner of the property covered, free from incumbrance, or stating to the company what his interest or the incumbrance therein is, if it be less than a fee-simple or absolute ownership. In such cases the plaintiff must show himself within the condition. It is, therefore, necessary to aver such an interest as the policy requires.[59]

What is the proper form for averring interest depends on the wording of the condition in the policy. It is best to follow this as closely as practicable. But some of the foregoing cases hold a general averment of interest is enough.[60] It has been held sufficient to aver interest in one of several counts.[61] The interest of third persons may be generally averred.[62] An interest in the life insured must be specifically set up.[63] But in one case, while it was held necessary to aver interest in life of assured,[64] it was not held to be necessary where plaintiff is a third person named as beneficiary of the policy, nor where the policy is set out and shows that plaintiff insured his own life.[65] An averment that defendant insured plaintiff to the amount of $3,000 on 10,000 bushels of oats, is a sufficient averment of interest.[66] But an allegation that defendant insured plaintiff's property, is not a sufficient allegation of interest in the plaintiff.[67]

It has been held not necessary to aver the extent and nature of a trustee's interest;[68] nor to aver continuance of interest to the time of loss;[69] nor to aver interest in a ship at the time the policy was made, nor the time when the risk commenced;[70] nor to allege offer by mortgage, to assign his mortgage interest to insurer by way of subrogation;[71] nor is it necessary to negative a change in the title of the property.[72]

4. *Occupancy.*—A condition is often inserted in policies, that the premises insured shall be occupied in a certain manner or for certain purposes. This may be, and generally is by the wording of the policy, a warranty.[73] Where it is a warranty, compliance or performance must be averred.

5. *Demand—Amount Due.*—A common omission is of a sufficient averment of the maturity of the claim and of the demand made. Ordinarily policies provide for the payment of the money sixty days after proof have been made. It must, therefore, be averred that the sixty days have elapsed and that the money has become due and payable under the policy.[74]

[53] Mutual Ben. Assn. v. Graumann, 107 Ind. 288.

[54] Combs v. Shrewsbury, etc. R. Co., 32 N. J. Eq. 512.

[55] Lounsbury v. Protection Ins. Co., 8 Conn. 459; Cornell v. Leroy, 9 Wend. 163; Catlin v. Springfield, etc. Co., 1 Sumn. 434.

[56] Phœnix Ins. Co. v. Perkey, 92 Ill. 164.

[57] Conway, etc. Co. v. Sewall, 54 Me. 352.

[58] Thompson v. St. Louis Ins. Co., 43 Wis. 459. And see also Fayerweather v. Phœnix Ins. Co., 7 N. Y. Superior Ct. 25; Schultz v. Merchants' Ins. Co., 57 Mo. 331; East Texas, etc. Co. v. Dyches, 56 Tex. 565; Barbaro v. Occidental Grove of Davids, 4 Mo. App. 429.

[59] Ætna Ins. Co. v. Black, 80 Ind. 513; Aurora, etc. Co. v. Johnson, 46 Ind. 315; Ætna Ins. Co. v. Myers, 63 Ind. 238; Hartford, etc. Co. v. Webster, 69 Ill. 392; Am. Ins. Co. v. Padfield, 78 Ill. 167; Ætna Ins. Co. v. Kittles, 81 Ind. 96; Rose v. Mut. Ben. L. I. Co., 23 N. Y. 516; Fowler v. New York, etc. Co. 26 N. Y. 422; Freeman v. Fulton, etc. Co., 38 Barb. 247; Williams v. Ins. Co. of North America, 9 How. Pr. 365. See also Phœnix Ins. Co. v. v. Benton, 87 Ind. 132; Home Ins. Co. v. Duke, 75 Ind. 535; Henshaw v. Mutual, etc. Co., 2 Blatch. 99.

[60] See Ferrer v. Home, etc. Co., 47 Cal. 416.

[61] Crawford v. Hunter, 8 Term Rep. 13.

[62] Godfrey v. Wilson, 70 Ind. 50.

[63] Elkhart, etc. Assn. v. Hougton, 98 Ind. 149.

[64] Guardian, etc. Co. v. Hogan, 80 Ill. 35.

[65] Massachusetts, etc. Co. v. Kellogg, 82 Ill. 614.

[66] Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520.

[67] Quarrier v. Peabody Ins. Co., 10 W. Va. 507.

[68] Henshaw v. Mutual Safety Co., 2 Blatch. 99.

[69] Russel v. St. Nicholas Ins. Co., 52 How. Pr. 459.

[70] Henshaw v. Mutual Safety Co., 2 Blatch. 99.

[71] Ætna Ins. Co. v. Baker, 71 Ind. 102.

[72] Clay, etc. Co. v. Wusterhausen, 75 Ill. 285.

[73] Poor v. Humboldt Ins. Co., 125 Mass. 274; Illinois, etc. Co. v. Marseilles, 1 Gilm. 236.

[74] Carberry v. German Ins. Co., 51 Wis. 606; Lester v. Piedmont, etc. Co., 55 Ga. 475. But see Excelsior Ins. Co. v. Riddle, 91 Ind. 84, 86. And see Western,

In alleging the amount due, it is enough to aver the amount of the policy, and to say that such amount was due on the policy;[75] it is unnecessary to allege the cash value of the property.[76] And even where it is necessary under the policy to allege the cash value of the property, an allegation that plaintiff had an "interest" in the property insured to an amount exceeding the sum named and was the exclusive owner, is not a sufficient averment of the cash value of the property.[77]

Where the allegation was that defendant "was bound by the terms of said policy to pay the plaintiff a proportionate share as hereinafter set forth of said loss," and that at the time of the loss plaintiffs held certain other policies of insurance upon the property destroyed, naming the several companies which issued them, "amounting in the aggregate, including the policy issued by the defendant corporation, to the sum of $39,500; and the said insurance companies were liable to the plaintiffs under said policies for such portion of the loss sustained as the sum insured by each of said companies bore to the whole amount insured by all of said companies therein, and the defendant corporation was liable and bound to pay the plaintiffs its said proportionate share, to-wit. $2,250: *Held*, that by "the said insurance companies" was meant all the companies in which insurance had been effected, including defendant, and that the declaration was good so far as the allegation of the amount due was concerned.[78]

6. *Other Insurance — Abandonment — Repair.*—There may or may not be conditions precedent or warranties in the policy concerning other insurance, abandonment, or repair, and upon this will depend the necessity and form of appropriate averments relative to these matters. It has been held unnecessary to aver a request, to indorse other insurance on the policy;[79] or to negative the existence of other insurance;[80] or to allege abandonment of vessel or facts showing total loss,[81] or to aver refusal to repair,[82] or to show insurer's failure to rebuild.[83]

7. *Limitation.*—Excuse for failing to sue within the time limited by the policy need not be shown.[84]

IV. CURE OF ERRORS IN DECLARATION.—The defendant may cure errors in a declaration by his pleas. Thus, plaintiff declared upon a certificate of insurance signed by insurer's secretary, and countersigned by the agent who accepted the risk, which stipulated that the plaintiffs were "insured according to the tenor and conditions of insurer's printed policies to be binding until a regular policy shall be issued from the principal office," etc. The conditions of a regular policy were not set out in plaintiff's petition, nor were there any averments in it showing an observance of the terms and conditions of a regular policy: *Held*, the court would examine the whole record to determine whether it was sufficient to support the judgment, and that as defendants had for the purpose of proving non-observance set out the conditions of a regular policy the record was good.[85] Averments in the answer may supply defects in the complaint.[86] Demurrer to evidence or a verdict may also cure them.[87] Absence of direct averments as to amount claimed and time of payment is cured by verdict.[88]

The above constitute the principal matters to be observed in declaring on policies of insurance. The main point requisite to correct pleading, is the observance of the distinction between warranties and conditions precedent on the one hand, and representations and conditions subsequent on the other, remembering that the existence of the first and performance must be shown, while the latter may be left to be looked after by defendant and its counsel. ADELBERT HAMILTON.

etc. Ins. Co. v. Scheidle, 18 Neb. 495; Ætna Ins. Co. v. Spark, 62 Ga. 187.

[75] Revere, etc. Co. v. Chamberlain, 56 Iowa, 508. See also Hegard v. California Ins. Co., 11 Pac. Rep. 594.

[76] Hegard v. California Ins. Co., 11 Pac. Rep. 594.

[77] Royal Ins. Co. v. Smith, 8 Ky. Law Rep. 521.

[78] Butterworth v. West. Assn. Co., 132 Mass. 489.

[79] Demill v. Hartford, etc. Co., 4 Allen (N. B.) 341.

[80] Troy, etc. Co. v. Carpenter, 4 Wis. 20.

[81] Snow v. Union Mut. M. I. Co., 119 Mass. 592.

[82] Union Ins. Co. v. McGookey, 33 Ohio St. 555.

[83] Ætna Ins. Co. v. Phelps, 27 Ill. 71.

[84] Andes Ins. Co. v. Fish, 71 Ill. 620.

[85] Dayton Ins. Co. v. Kelley, 24 Ohio St. 345.

[86] Hegard v. California Ins. Co., 11 Pac. Rep. 594.

[87] McLean v. Equitable L. A. Co., 100 Ind. 127; Royal Ins. Co. v. Smith, 8 Ky. Law Rep. 521,

[88] Lester v. Piedmont, etc. Co., 55 Ga. 475; Phœnix Ins. Co. v. Perkey, 92 Ill. 164. See also Lingenfelter v. Phœnix Ins. Co., 19 Mo. App. 252.

PATENTS FOR INVENTIONS — FRAUD — INFRINGEMENT—REMEDY.

UNITED STATES V. AMERICAN BELL TELEPHONE COMPANY.

United States Supreme Court, November 12, 1888.

Although parties against whom actions are brought for (alleged) infringement of patents for inventions, may set up in bar of such actions the invalidity of the patent, caused by the fraud of the patentee, it is, nevertheless, also competent for the United States to maintain an action to abrogate and cancel a patent on the ground that its issuance was procured by fraud.

Mr. Justice MILLER, delivered the opinion of the court:

This is an appeal from the circuit court of the United States for the District of Massachusetts.

The United States brought its suit in equity in that court against the American Bell Telephone Company, a corporation organized under the laws of the State of Massachusetts, and against Alexander Graham Bell, a resident of the District of Columbia. The action purports to have been instituted by George M. Stearns, the United States district attorney for that district, by the direction of George A. Jenks, the solicitor-general of the United States, acting as its attorney-general in this matter, because the latter officer was under a disability to prosecute this suit.

The object of the bill was to impeach two patents for inventions issued to said Bell, the first dated March 7, 1876, and numbered 174,465, and the second dated January 30, 1877, and numbered 186,787, with a prayer that they be declared void and of no effect, and that they be in all things recalled, repealed and decreed absolutely null; that they be erased and obliterated from the records of the patent office and for other relief.

To this bill the telephone company entered an appearance and filed a demurrer. It is not shown that Bell either appeared or filed any pleading. At the hearing on the demurrer it was sustained by the circuit court, the bill dismissed, and the United States has brought the present appeal to reverse that ruling.

[Omitting two minor grounds of demurrer.]

But the second group of causes of demurrer is perhaps the most important, and the one on which counsel seem to have principally relied, the essence of which is that "no power or authority in law exists, in any person or party, or any court, to bring said suit, nor to entertain the same, nor to give the relief therein prayed, nor any relief thereunder or touching the subject-matter thereof," and "that the complainant has not made or stated a case which calls upon or justifies this court in the exercise of its discretion to permit this bill to be entertained."

It will be observed that this broad assertion admits that a party may practice an intentional fraud upon the officers of the government, who are authorized, and whose duty it is to decide upon his right to a patent, and that he may by means of that fraud perpetrate a grievous wrong upon the general public, upon the United States and upon its representatives. It admits that by prostituting the forms of law to his service he may obtain an instrument bearing the authority of the government of the United States, entitling him to a monopoly in the use of an invention which he never originated, of a discovery which was made by others, and which, however generally useful or even necessary it may become, is under his absolute and exclusive control, either as to that use or as to the price he may charge for it, during the life of the grant. It assumes that the government, which has thus been imposed upon and deceived, is utterly helpless, that it can take no steps to correct the evil or to redress the fraud. If such a fraud were practiced upon an individual he would have a remedy in any court having jurisdiction to correct frauds and mistakes and to relieve against accident; but it is said that the government of the United States—the representatives of sixty millions of people, acting for them, on their behalf, and under their authority—can have no remedy against a fraud which affects them all, and whose influence may be unlimited.

Though by the constitution of the United States it is declared that "the judicial power shall extend to all cases, in law and in equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and "to controversies to which the United States shall be a party," the argument asserts that the practice of a gross fraud upon the United States, concerning matters of immense pecuniary value, and affecting a very large part of its population, is not a proper question of judical cognizance. It would be a strange anomaly in a government organized upon a system which rigidly separates the powers to be exercised by its executive, its legislative and its judicial branches, and which in this emphatic language defines the jurisdiction of the judicial department, to hold that in that department there should be no remedy for such a wrong.

As we shall presently see, this court has repeatedly held, after very full argument, and after a due consideration of the proposition here stated, that in regard to patents issued by the government for lands conveyed to individuals or to corporations, the circuit courts of the United States do have jurisdiction to set aside and cancel them for frauds committed by the parties to whom they were issued. This class of cases will be considered further on. It is sufficient to say here that they establish the right of the United States to bring suits in its own courts to be relieved against fraud committed in cases of that class exactly similar to that charge in the present case. And it is also to be observed that in those cases there is no express act of congress authorizing such procedure, a ground of objection which is here urged.

Recurring to the constitution itself as the great source of all power in the United States, whether executive, legislative or judicial, there is a strik-

ing similarity in the language of that instrument conferring the power upon the government under which patents are issued for inventions and patents are issued for lands. It is declared in article 1, section 8, paragraph 8, that "the congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is by virtue of this clause that congress has passed the laws under which the patents of the defendant in this case were issued.

Article 4, section 3, paragraph 2, declares that "the congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It is under this clause that congress has passed laws by which title to public lands is conveyed to individuals, by instruments also called patents.

The power therefore to issue a patent for all invention, and the authority to issue such an instrument for a grant of land, emanate from the same source, and although exercised by different bureaux or officers under the government, are of the same nature, character and validity, and imply in each case the exercise of the power of the government according to the modes regulated by acts of congress.

With regard to the jurisdiction of the circuit court in which this suit was brought, there does not seem to be any objection made by defendants, if such suit could be brought in any court. Indeed, the language of the act of congress on that subject does not admit of any such doubt, for it declares "that the circuit court of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners." 18 U. S. Stat. 470, act of March 3, 1875.

In the present case the United States are plaintiffs, and the bill asserts that the suit is one of a civil nature and of equitable cognizance; and manifestly, if it presents a good cause of action, it arises under the laws and constitution of the United States. It is therefore within the language both of the constitution and of the statute conferring jurisdiction on the circuit courts. An examination of the specific objections made to the present bill will illustrate and enforce this general view. While it cannot successfully be denied that the general powers of a court of equity include the right to annul and set aside contracts or instruments obtained by fraud, to correct mistakes made in them, and to give all other appropriate relief against documents of that character, such as requiring their delivery up, their cancellation or their correction, in order to make them conform to the intention of the parties, it would seem to require some special reasons why the government of the United States should not be able to avail itself of these powers of a court of equity. Accordingly the defendant objects that the appropriate remedy, if any exists, is in the common law courts, and not in a court of equity, and that in the ancient proceedings of our English ancestors in regard to patents the only remedy for relief against them when they were improvidently issued was by a *scire facias* in the name of the king, or by his express and personal revocation of them.

Charters and patents authenticating grants of personal privileges were in the earlier days of the English goverment made by the crown. They were supposed to emanate directly from the king, and were not issued under any authority given by acts of parliament, nor were they regulated by any statutes. Being therefore in their origin an exercise of his personal prerogative, the power of revoking them, so far as they could be revoked at all, was in the king, and was exercised by him as a personal privilege. This mode of revoking patents however seems to have fallen into disuse, and the same end was attained by the issue of writs of *scire facias* in the name of the king to show cause why the patents should not be repealed or revoked. These were of course returnable into some court, and it appears to have been the practice to do this in the court of king's bench or in the court of chancery, where the record of the patent always remained in what was called the petty bag office. If the latter mode is to be considered a proceeding in chancery, which under our adoption of the methods and jurisdiction of the high court of chancery in England, would fall within the province of a chancery court in this country, then the precedent for the exercise of this jurisdiction by a court of chancery is clear and undoubted. This however is a question, which if not in relation to this particular class of cases, has in regard to others, concerning the prerogative jurisdiction of the court of chancery in this country, been doubted. But the courts of England seem to have considered that in the matter of repealing or revoking a patent the king may sue in what court he pleases. See Magdalen College Case, 11 Coke Rep. 68*b* and 75*a*.

The jurisdiction to repeal a patent by a decree of a court of chancery as an exercise of its ordinary powers was sustained in the case of Attorney-General v. Vernon, 1 Vernon's Ch. Rep. 277. In that action a bill was brought by the attorney-general against Vernon and others to set aside a patent issued by the crown, on the ground that it was obtained by surprise and by false particulars. It was insisted by the defendant's counsel that there never had been any precedent of this nature to repeal letters patent by an English bill in chancery, but that it was a case of first impression; and they contended that the title under the letters patent was one purely at law, and returnable there; likewise that there was a remedy by *scire facias*. It was also objected that the word

"fraud," which if any thing must give jurisdiction to the court in the case, was not in the whole bill. Also among other things it was objected that if letters patent should be impeached by an English bill in chancery upon such suggestions and pretensions as these, no patentee could be safe, nor would the king's seal be of any force. To this it was replied on the part of the king, that he may sue in what court he pleases; that the bill charges surprise and false particulars, and that fraud is properly relievable here; that the king ought not to be in a worse condition than a subject; that a nobleman would be relieved of such a fraud put upon him by his servant; and that if the king could not be relieved in this case by an English bill he would be without remedy. Whereupon the lord keeper said: "The question is short, whether there be a fraud or not? If a fraud, then properly relievable here. It is not fit such a matter as this should be stifled upon a plea; and therefore the lord keeper overruled the plea, and denied to save the benefit of it till the hearing, because he would not give any contenance to such a case."

So far as precedent is concerned, this case, which has never been overruled, establishes the doctrine that in a case of fraud in the obtaining of a patent, a court of chancery, by virtue of that fact, has jurisdiction to repeal or revoke it.

The case of King v. Butler, 3 Levinz's Rep. 220, which was heard in the house of lord, was one where the king had made a grant of a market by letters patent to Sir Oliver Butler, the defendant. A writ of *scire facias* was brought in the court of chancery to repeal the grant, and the lord chancellor gave judgment that it should be vacated, whereupon the matter was brought by a writ of error to the house of lords, and after argument there the peers requested the opinion of the judges then attending in parliament, who all unanimously agreed that the judgment given in chancery ought to be affirmed, and delivered their opinion accordingly. It was objected that the writ did not lie, because there was a remedy by the common law, to-wit, by assize of nuisance, where the matter should be tried by a jury, and by several judges, and not by only one, as it is in chancery. To which they answered that the king has an undoubted right to repeal a patent wherein he is deceived or his subjects prejudiced. And in none of the cases cited was there any question whether the writ would lie, but only the manner of pursuing it, and other incident matters. It was said that it was not unusual for the king to have his remedy as well as the subject also.

The whole text of the answers of the judges in this case seems to imply that a jury was not necessary, but that the existence of the record in the court of chancery was a sufficient foundation for the proceeding there, though it might be brought in some other court, when the king had declared the patent forfeited, or when there had been office found. The judgment of the court of chancery was therefore affirmed. See on this subject Queen v. Aires, 10 Mod. 354; Queen v. Eastern, Archipelago Co., 1 E. & B. 310; Cumming v. Forrester, 2 Jac. & Walk. Ch. Rep. 431.

But whatever may have been the course of procedure usual or requisite in the English jurisprudence, to enable the king to repeal, revoke or nullify his own patents, issued under his prerogative right, it can have but little force in limiting or restricting the measures by which the government of the United States shall have a remedy for an imposition upon it or its officers in the procurement or issue of a patent. We have no king in this country; we have here no prerogative right of the crown; and letters patent, whether for inventions or for grants of land, issue not from the president, but from the United States. The president has no prerogative in the matter. He has no right to issue a patent, and though it is the custom for patents for lands to be signed by him, they are of no avail until the proper seal of the government is affixed to them. Indeed, a recent act of congress authorizes the appointment of a clerk for the special purpose of signing the president's name to patents of that character. And so far as patents for inventions are concerned, whatever may have been the case formerly, since the act of July 8, 1870, they are issued without his signature and without his name or his style of office being mentioned in them. The authority for this procedure is embodied in the following language of the Revised Statutes:

"Sec. 4883. All patents shall be issued in the name of the United States of America, under the seal of the patent office, and shall be signed by the secretary of the interior and countersigned by the commissioner of patents, and they shall be recorded, together with the specifications, in the patent office, in books to be kept for that purpose."

This only expresses the necessary effect of the acts of congress. The authority by which the patent issues is that of the United States of America. The seal which is used is the seal of the patent office, and that was created by congressional enactment. It is signed by the secretary of the interior, and the commissioner of patents, who also countersigns it, is an officer of that department. The patent then is not the exercise of any prerogative power or discretion by the president or by any other officer of the government, but it is the result of a course of proceeding *quasi* judicial in its character, and is not subject to be repealed or revoked by the president, the secretary of the interior or the commissioner of patents when once issued. See United States v. Schurz, 102 U. S. 378.

It is not without weight, in considering the jurisdiction of a court of equity in regard to the power to impeach patents, that an appeal is provided from the decision of the commissioner of patents to the Supreme Court of the District of Columbia, and that the Revised Statutes enact as follows:

"Sec. 4915. Whenever a patent on application is refused, either by the commissioner of patents

or by the Supreme Court of the District of Columbia, upon appeal from the commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear."

It is then further provided that if the adjudication be in favor of the applicant, it shall authorize the commissioner of patents to issue such patent upon the applicant's filing in the patent office a copy of the adjudication.

These provisions, while they do not in express terms confer upon the courts of equity of the United States the power to annul or vacate a patent, show very clearly the sense of congress that if such power is to be exercised anywhere it should be in the equity jurisdiction of those courts. The only authority competent to set a patent aside, or to annul it, or to correct it, for any reason whatever, is vested in the judicial department of the government, and this can only be effected by proper proceedings taken in the courts of the United States.

This subject has been frequently discussed in this court, and the principles necessary to its decision have been well established. The case of United States v. Stone, 2 Wall. 525, was a bill in chancery brought by the United States in the circuit court for the district of Kansas, to set aside a patent issued by the government to Stone, the defendant. The question of the jurisdiction of the court to entertain such a bill, which was denied by counsel for Stone, was discussed at considerable length in their brief, and in the argument of counsel for the United States the language of Chief Justice Kent in Jackson v. Lawton, 10 Johns. 24, was cited to the following effect: "The English practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us. In addition to the remedy by *scire facias*, etc., there is another by bill in the equity side of the court of chancery. Such a bill was sustained in the case of Attorney-General v. Vernon, 1 Vernon, 277, to set aside letters patent obtained by fraud, and they were set aside by a decree."

The extract from the brief of counsel in the Stone Case is cited to show that the attention of the court was turned to this question, and the language of the opinion, as delivered by Mr. Justice Grier, expresses in sententious terms the result arrived at by this court in regard to this entire question. It is as follows: "A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy. Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court. It is contended here by the counsel of the United States that the land for which a patent was granted to the appellant was reserved from sale for the use of the government, and consequently that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed."

We cite thus fully from the case because it is the first one in which the questions now before us were fully considered and clearly decided. In the previous case of United States v. Hughes, 11 How. 552, the same question came before the court on demurrer. The court held that the demurrer must be overruled, saying that it cannot "be conceived why the government should stand on a different footing from any other proprietor." The case afterward came again before this court, and is reported in 4 Wall. 232, later than the Stone Case. The court then said: "It was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of congress."

In the case of Moore v. Robbins, 96 U. S. 530, this court said, in a suit between private citizens, and speaking of the issue of patents by the government: "If fraud, mistake, error or wrong has been done, the courts of justice presents the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or conveyance of the land as to individuals; and if the government is the party injured this is the proper course."

In Moffat v. United States, 112 U. S. 24, a decree of the circuit court setting aside a patent as having been obtained by fraud was affirmed; and the same doctrine was reasserted in United States v. Minor, 114 U. S. 233. Still later, in the case of Colorado Coal and Iron Co. v. United States, 123 U. S. 307, the right of the court, by a proceeding in equity at the instance of the attorney-general and in the name of the United States, to set aside a patent for land, was fully recognized, and the language used in the case of United States v. Minor, *supra*, was cited to the following effect: "Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite

too far to say that it cannot be assailed by a proceeding in equity and set aside as void if the fraud is proved and there are no innocent holders for value."

The whole question was reviewed at great length by this court at its last term in the case of United States v. San Jacinto Tin Co., 125 U. S. 273, when all the cases above mentioned, and others, were cited and commented upon. The matter is thus summed up in the opinion of the court: "But we are of opinion that since the right of the goverment of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud, which would render the instrument void, and the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the case in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States.

It is insisted that these decisions have reference exclusively to patents for land, and that they are not applicable to patents for inventions and discoveries. The argument very largely urged for that view is the one just stated, that in the cases which had reference to patents for land the pecuniary interest of the United States was the foundation of the jurisdiction. This, however, is repelled by the language just cited, and by the fact that in more than one of the cases, notably in United States v. Hughes, *supra*, the right of the government to sustain the suit was based upon its legal or moral obligation to give a good title to another party who had a prior and a better claim to the land, but whose right was obstructed by the patent issued by the United States.

The case of Mowry v. Whitney, 14 Wall. 434, was a bill in chancery brought by Mowry in the circuit court for the eastern district of Pennsylvania against Whitney, charging that Whitney's patent for a mode of annealing and cooling cast-iron car wheels, and an extension of it made by the patent office, had been procured by fraud and false swearing, and praying that it and the extension may be declared void and of no effect. To this bill Whitney demurred. The demurrer was sustained by the court below, and from the decree dismissing the bill Mowry took an appeal to this court, where it was said "that the complainant could not in his own right sustain such a suit." In giving its reasons for this, the court said: "We are of opinion that no one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government had issued to an individual, except in the cases provided for in section 16 of the act of July 4, 1836. The ancient mode of doing this in the English courts was by *scire facias*, and three classes of cases are laid down in which this may be done." One of these is: "When the king has granted a thing by false suggestion, he may by *scire facias* repeal his own grant. Citing 4 Inst. 88; Dyer, 197-8, and 276, 279. * * * The *scire facias* to repeal a patent was brought in chancery where the patent was of record. And though in this country the writ of *scire facias* is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its modes of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the government. This is settled, so far as this court is concerned, by the case of United States v. Stone, 2 Wall. 525." The opinion then refers to Attorney-General v. Vernon, and Jackson v. Lawton, already cited.

It is said that this language of the court is *obiter*, and does not decide directly that a suit can be brought in chancery to cancel or annul a patent issued by the United States government for an invention. It is true that what the court was called upon to decide was that a private citizen could not bring such suit, but evidently the reason given for it must be held to establish the principle

upon which the court acted, and that reason was that the private citizen could not do it because the right lay with the government. The duty and the right of the government to bring an action which would end in the destruction of the patent, and which would thus protect everybody against the asserted monopoly of it, was the reason why the private citizen could not for himself bring such a suit.

Another reason given by the court is that the fraud, if one exists, must have been practiced on the government, which, as the party injured, is the appropriate party to seek relief, and that a suit by an individual could only be conclusive in result as between the patentee and the party suing, and the patent would remain a valid instrument as to all others; while if the action was brought by the government, and a decree had to annul the patent, this would be conclusive in all suits founded on the patent. Other reasons were given showing that the United States was the appropriate party to bring such a suit, and that the circuit court of the United States, sitting in equity, was the proper tribunal in which to bring it; all tending to show that the reason why a private citizen could not have such relief was that it belonged to the government.

The United States by issuing the patents which are here sought to be annulled, has taken from the public rights of immense value and bestowed them upon the patentee. In this respect the government and its officers are acting as the agents of the people, and have, under the authority of law vested in them, taken from the people this valuable privilege and conferred it as an exclusive right upon the patentee. This is property, property of a value so large that nobody has been able to estimate it. In a former argument in this court it was said to be worth more than $25,000,000. This has been taken from the people, from the public, and made the private property of the patentee by the action of one of the departments of the government acting under the forms of law, but deceived and misled, as the bill alleges, by the patentee. That the government, authorized both by the constitution and the statutes to bring suits at law and in equity, should find it to be its duty to correct this evil, to recall these patents, to get a remedy for this fraud, is so clear that it needs no argument; and we think we have demonstrated that the proper remedy is the one adopted by the government in this case.

But conceding that in regard to patents for land, and in reference to other transactions in which the government is a party, the courts of equity have jurisdiction to correct mistakes, to give relief for frauds, and to cancel contracts and other important instruments, it is said that in reference to patents for inventions and discoveries the acts of congress have provided another remedy for frauds committed in obtaining them, and for the very class of frauds set up in this bill. Counsel therefore contend that this supersedes all others. This rememedy is found in the following provision of the Revised Statutes:

"Sec. 4920. In any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

"First. That for the purpose of deceiving the public the description and specification filed by the patentee in the patent office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produced the desired effect; or

"Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or

"Third. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or

"Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or

"Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public."

Prior to the year 1836, from the earliest enactments of patent law, certain provisions had been incorporated in that law authorizing a *scire facias* to issue to declare a patent void for want of invention by the patentee, and other matters, which though instituted by a private individual, was under the control of the official attorneys of the government. This was repealed by the act of 1836, which may be said to be the first real and successful organization of the patent office and the system of patent law in the United States. The law on this subject was revised by the act of congress of July 8, 1870 (16 U. S. Stats. 198), and the Revised Statutes of the United States, from which section 4920 is quoted, contain this language applicable to this subject.

The statute of 1836 repealed the provision for a *scire facias*. It is now argued that the repeal of this provision, together with the enactment of the provision of section 4920, show that the only remedy for the improvident issuing of a patent is to be found in the language of that section. These clauses, while they do not in any general form declare that a person sued for an infringement of a patent may set up as a defense that it was procured by fraud or deceit, do in effect specify various acts of fraud which the infringer may rely upon as a defense to a suit against him founded upon that instrument. It is therefore urged that because each individual affected by the monopoly of the patent is at liberty, when he is sued for using it without license or authority, to set up these defenses, the remedy which the United States has under the principles we have attempted to sustain, is superseded by that fact. But a consideration of the nature and effect of these different modes of proceeding in regard to the patent will show that no such purpose can be inferred from these clauses of the act of congress.

In the first place, the right given to the infringer to make this defense is a right given to him personnally, and to him alone, and the effect of a successful defense of this character by one infringer is simply to establish the fact that as between him and the patentee no right of action exists for the reasons set up in such defense. But the patentee is not prevented by any such decision from suing a hundred other infringers, if so many there be, and putting each of them to an expensive defense, in which they all, or some of them, may be defeated and compelled to pay, because they are not in possession of the evidence on which the other infringer succeeded in establishing his defense. On the other hand, the suit of the government, if succesful, declares the patent void, sets it aside as of no force, vacates it or recalls it, and puts an end to all suits which the patentee can bring against anybody. It opens to the entire world the use of the invention or discovery in regard to which the patentee has asserted a monopoly.

This broad and conclusive effect of a decree of the court, in a suit of that character brought by the United States is so widely different, so much more beneficial, and is pursued under circumstances so much more likely to secure complete justice, than any defense which can be made by and individual infringer, that it is impossible to suppose that congress, in granting this right to the individual intended to supersede or take away the more enlarged remedy of the government. Some of these specifications of grounds of defense are not such as would ordinarily be sufficient in a court of equity to set aside the patent, as "that it had been in public use or on sale in this country for more than two years," or "that it had been patented or described in some printed publication prior to his supposed invention or discovery thereof." It is unnecessary to decide whether these grounds now would be sufficient cause for setting aside a patent in a suit by the United States, but they are not of that general character which would give a court of equity jurisdiction to do that, except as it may be said they are now parts of the general system of the patent law.

A question almost identical with this was made in the house of peers in the case of King v. Butler, 3 Levinz, 220, as to whether the judgment obtained by the king in the court of chancery repealed the grant to Butler. It was answered by the judges to some of the objections that "it was not unusual for the king to have his remedy, as well as the subject also, as for batteries, trespasses, etc., the king has a remedy by information indictment, and the party grieved by his action.

The argument need not be further extended. There is nothing in these provisions expressing an intention of limiting the power of the government of the United States to get rid of a patent obtained from it by fraud and deceit. And although the legislature may have given to private individuals a more limited form of relief, by way of defense to an action by the patentee, we think the argument that this was intended to supersede the affirmative relief to which the United States is entitled, to obtain the cancellation or vacation of an instrument obtained from it by fraud, an instrument which affect the whole public, whose protection from such a fraud is eminently the duty of the United States, is not sound.

The decree of the circuit court dismissing the bill of plaintiff is reversed, and the case remanded to that court, with directions to overrule the demurrer, with leave to defendants to plead or answer, or both, within a time to be fixed by that court.

Mr. Justice Gray was not present at the argument, and took no part in the decision of this case.

NOTE.—The principal case is a very important one, inasmuch as it decides a principle never having before been passed upon by the Supreme Court of the United States. It is also important from the fact that the question involved is very fully and elaborately discussed in clear and terse language by Mr. Justice Miller, who delivered the opinion of the court.

The broad position was taken by the defendant telephone company that the attorney-general had no power to bring, nor the federal courts power to entertain a bill to cancel a patent for invention under *any circumstances;* that the right to grant or cancel belongs exclusively to congress. This position was sought to be established by lengthy arguments and briefs filed, both in the supreme court and in the United States circuit court for the District of Massasachusetts, where the case originated. A very full abstract of the briefs submitted to the latter tribunal will be found in 32 Fed. Rep. 592-597. The circuit court, while admitting that the question was not free from doubt, held, upon the decision of Judge Shepley in Attorney-General v. Chemical Works[1] that, in the absence of express statutory enactment, the government possessed no power to maintain the suit.[2]

The rule had been established by the supreme court in Mowry v. Whitney[3] that an individual could not maintain a suit to repeal or otherwise set aside a patent for fraud or any other ground, except that of an interference.[4]

So, as the law stood previous to the decision of the principal case,, where the frauds were ingenious enough to keep clear of all known defenses to infringement suits, the wrongs which they caused were without a remedy, unless it be conceded that the government could repeal a patent which its officers had been fraudulently induced to grant or reissue. Hence, it was impossible to know, previous to this decision, whether any court had jurisdiction on any ground of fraud or mistake to repeal letter patents for inventions, although the rule had been established that equity had jurisdiction to repeal letter patents for lands, obtained by fraud or mistake, whenever the United States filed a bill stating the facts and praying that the letters may be annulled.[5] And the principal

[1] 2 Ban. & Ard. 298; 32 Fed. Rep. 608.

[2] 32 Fed. Rep. 590.

[3] 14 Wall. 439.

[4] See Walker on Patent, § 321.

[5] United States v. Stone, 2 Wall, 535; Moore v. Robbins, 96 U. S. 536; Hughes v. United States, 4 Wall. 232; United States v. Hughes, 11 How. 552; Field v. Seaburg, 19 How. 324; United States v. Throckmorton, 98 U. S. 61; United States v. Minor, 114 U. S. 273; Mahn v. Harwood, 112 U. S. 355; Doughty v. West, 6 Blatchf. 433; 1 Opinion Atty.-Gen. 458; 4 Opinion Atty.-Gen. 120.

case declares expressly that this doctrine is equallly applicable to patents for inventions.[6]

Upon principle and authority it would seem that every government should possess an inherent right to revoke a grant made by it which had been produced by fraud, or which had been made through inadvertence or mistake,[7] and that such power should exist in the attorney-general to bring an action to redress a public wrong.[8]

A patent for an invention or improvement is a contract between the government and the patentee. The consideration on the one hand is the invention or discovery of the patentee, and on the other, the exclusive right to use it for a specified time. And if there is a failure of consideration it would seem that the courts should permit the contract to be avoided by the party wronged, as in contract between private individuals under like circumstances. The inventor only acquires the granted rights by complying with the law, as the individual acquires rights under a contract with a private person. And if the latter has by fraud or deceit imposed upon the other party, equity will unhesitatingly grant relief to the party defrauded. Indeed, the general power of a court of equity includes the right to annul and set aside contracts or instruments obtained by fraud, to correct mistakes in them, and o give all other appropriate relief against documents, etc., of this character. Why should not the rule apply to the government where it has been wronged? The rule has been long established that a public or private corporation possesses inherent power to bring actions to enforce its rights and redress its wrongs.[9]

The defendant in the principal case denied that the government possessed this power, but insisted, if any remedy existed, in harmony with the old English practice, that the writ of *scire facias* should be invoked. But the early methods of conferring patent-rights in England differ radically from the methods established in our country, as is clearly pointed out by Mr. Justice Miller. In the early days of England, charters and patents were not authorized by act of parliament, nor regulated by statute, but were conferred directly by the crown, in exercise of the king's prerogative, and they having emanated from this source, the power of revoking was exercised as a personal privilege. This mode afterwards fell into disuse, but the same end was attained by the writ of *scire facias*, in the name of the king, and the practice was to return such writs to the court of the king's bench and the court of chancery, although the suit might be brought in any court.[10] And in Attorney-General v. Vernon,[11] the jurisdiction to repeal a patent by decree of chancery on the ground of fraud was sustained. But in this country the president is not authorized to issue and revoke patents. The whole matter is regulated by law of congress and the patents are issued by the government. The government is a party to the contract, and its right to sue is based on the same general principles as would authorize a private individual to apply to a court of chancery for relief against instruments obtained from him by fraud or deceit.

Mr. Walker, in his work upon Patents, assumed that such jurisdiction to annul, etc., under like circumstances, in patents for inventions, the same as in patents to lands, did inhere "in some class of courts," and outlined its character, based upon adjudications which he declared to be of undoubted authority, as follows: The bill for repeal must be filed by the United States;[12] acting through the United States district attorney of the district wherein it is filed;[13] and it must be filed in the circuit court of the United States for that district;[14] and be filed before the expiration of the patent which it seeks to repeal.[15] No citizen has any power to compel the United States or the district attorney to file such a writ, or to control its prosecution after it is filed.[16] E. M.

6 See United States v. Gunning, 18 Fed. Rep. 511; Rubber Co. v. Goodyear, 9 Wall. 79.

7 Attorney-General v. Vernon, 1 Vern. 276; King v. Butler, 3 Lev. 220; Queen v. Aires, 10 Mod. 354.

8 Soul Proprietary v. Jennings, 1 Har. & McH. 92; Attorney-General v. Railway Co., 35 Wis. 425; Attorney-General v. Academy, 52 Wis. 469.

9 1 Dilion on Mun. Corp. § 31; Ang. & Ames on Corp. §§ 69, 370; Story on Const. § 1674; Cooley Const. Limit. 15; Spears Fed. Juris. 101; Dugan v. United States, 3 Wheat. 181; Delafield v. Illinois, 2 Hill, 162; Indiana v. Woram, 6 Hill, 33; United States v. Bank, 15 Pet. 401; Cotton v. United States, 11 How. 231.

10 Magdalan College Case, 11 Coke Rep. 66b, 75a.

11 1 Vernon's Ch. Rep. 277.

12 Mowry v. Whitney, 14 Wall. 440.

13 Attorney-Gen. v. Chemical Works, 2 Ban. & Ard. 308.

14 Rev. Stat. U. S. § 629, p. 9.

15 Bourne v. Goodyear, 9 Wall. 811.

16 New York & Baltimore Coffee P. Co. v. New York Polishing Co., 9 Fed. Rep. 580; Walker on Patents, § 323.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ABATEMENT AND REVIVAL — Marriage — Contract — Cancellation. —— The right of action to cancel a marriage contract, which, if genuine, and followed by consummation, would create rights in the property of the alleged husband, survives to his executors or admin-

istrators.—*Sharon v. Terry*, U. S. C C. (Cal.), Sept. 3, 1888; 36 Fed. Rep. 337.

2. ADMIRALTY--Practice—Interest—Appeal.—— Where both parties appeal from the decision of the district court apportioning damages in a collision case, the circuit court on affirming the decree of the district court will not allow interest thereon.—*Boown v. The C. P. Raymond*, U. S. C. C. (N. Y.) Dec. 9, 1887; 36 Fed. Rep. 336.

3. ADMIRALTY— Proceeding in Personam Attachment. ——Rule 2, of the admiralty rules of practice, authorizing the arrest of the person of the defendant on *mense* process, and, if he cannot be found, for an attachment of his goods and chattels, does not authorize an attachment in Alabama, where imprisonment for debt has been abolished.—*Chiesa v. Conover*, U. S. D. C. (Ala.), Sept. 21, 1888; 36 Fed. Rep. 334.

4. APPEAL— Assigning Errors. —— A general assignment in the motion for a new trial, that the court erred in giving each of the instructions, is too general, and will not be considered on appeal.— *Russell v. Rosenbaum*, S. C. Neb., Nov. 8, 1888; 40 N. W. Rep. 287.

5. APPEAL—Assignment of Errors — Sufficiency. —— An objection, that the verdict is excessive, cannot be raised by an assignment of error in the words: "The court erred in overruling the defendant's motion for a new trial.—*Evans v. Delk*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 550.

6. APPEAL—Certificate of Bond Filed.——Under California law, a certificate simply stating that the clerk had compared the transcript with the papers on file, and it was correct, is fatally defective on appeal, though the undertaking is embodied on the transcript. — *San Francisco, etc. R. R. v. Anderson*, S. C. Cal., Oct. 27, 1888; 19 Pac. Rep. 517.

7. APPEAL—Dower — Final Order. —— An order approving the report of commissioners appointed to apportion dower is not a judgment, from which an appeal is allowed, under Missouri law. — *Rannels v. Washington University*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 569.

8. APPEAL—Former Ruling—Stare Decisis. ——A previous ruling by the appellate court upon a point distinctly made, in the case in which it i made is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves. — *Chicago, etc. R. R. v. Hull*, S. C. Neb., Nov. 7, 1888; 40 N. W. Rep. 280.

9. APPEAL—New Trial—Bill of Exceptions.——Where a new trial is sought upon a petition filed after the term at which the judgment was rendered, the evidence on the trial, as well as the newly-discovered evidence, must be set out in a bill of exceptions. — *Omaha, etc. R. R. v. O'Donnell*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 298.

10. APPEAL— Nonsuit—Review. —— A judgment of a nonsuit properly rendered will not be disturbed on appeal.—*Richard v. Bergeron*, S. C. La., July Term, 1888; 5 South. Rep. 15.

11. APPEAL — Order — Motion. —— The denial of motions on behalf of defendants to strike out portions of an amended replication and to remove the answer of a defendant from the files, does not authorize an appeal.—*Lane v. Richardson*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 710.

12. APPEAL—Order— Motion to Vacate. —— Upon an appeal from a judgment, an order denying a motion to vacate the judgment cannot be reviewed. — *Jenness v. Bowen*, S. C. Cal., Oct. 30, 1888; 19 Pac. Rep. 522.

13. APPEAL—Question — Reserved. —— Construction of Indiana statutes relative to the reservation of a question of law of adjudication by the supreme court. Circumstances stated under which it was held that the questions reserved were questions of fact as well as of law. — *Woodward v. Baker*, S. C. Ind., Nov. 17, 1888; 18 N. E. Rep. 524.

14. APPEAL—Review— Decision on Appeal. —— A decision of the supreme court, rendered after full argument and affirmed on rehearing, will not be reviewed, in the absence of fraud, on the sole ground of a false statement of a material fact found by a referee, and not excepted to, but known to both parties at the hearing. —*Farrar v. Staton*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 753.

15. APPEAL—Review—Instructions.—— Although the issue submitted to the jury by the court is very general in its bearings upon the pleadings and scarcely a proper one, yet, where neither party objects to it, it must be taken as admitted by consent.—*Chemical Co. v. Johnson*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 770.

16. APPEAL—Weight of Evidence. ——In an action on a note where there was some evidence, without objection, that a payment was made, which would take it out of the statute of limitations, and no instructions were asked in regard to it, a verdict for plaintiff cannot be set aside as against the weight of evidence. — *Sugg v. Watson*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 709.

17. APPEAL—Weight of Evidence.—— Where there is evidence to support a verdict, it will not be disturbed where there is nothing to show that it was the result of partiality, passion or prejudice. — *Ogleby v. Corby*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 584.

18. ARBITRATION AND AWARD — Appeal — Practice — Sheriff.——Where a sheriff is forbidden to become security on recognizances taken in the court it is error to dismiss an appeal from an award in which the sheriff is surety. The proper practice is to require the party to perfect his bail and on his failure to do so to dismiss the appeal.—*Kerr v. Martin*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 860.

19. ARBITRATION AND AWARD— Submission — Validity. ——Where parties execute an agreement to submit a controversy to arbitration, and it is clear that a statutory arbitration was intended, but it is not valid by failure to comply with some essential requirement of the statute, it cannot operate as a common law submission.—*Holdridge v. Stowell*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 259.

20. ARREST—Civil Action—Money Collected. —— Under Code N. C. § 291 an affidavit, alleging that defendant was the agent of plaintiff, and that as such he collected money, which he fraudulently and unlawfully converted to his own use, with intent to defraud and cheat the plaintiff, warrants an order of arrest, though defendant resides in another State, and though the fraud was committed in another State. — *Powers v. Davenport*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 747.

21. ASSAULT AND BATTERY — Provocation —Evidence. ——In an action for assault and battery, evidence that three hours before the assault plaintiff insulted defendant's wife is inadmissible as matter of provocation. — *Dupee v. Lentine*, S. S. C. Mass., Nov. 15, 1888; 18 N. E. Rep. 465.

22. ASSIGNMENT—Creditors— Reconveyance—Jurisdiction—Res adjudicata—Accounting.—— It is within the jurisdiction of the probate court to order reconveyance to the assignor, upon his request, that of the assignee and the creditors to terminate the trust. Circumstances stated under which the sureties of the assignee who has conveyed to the assignor the balance left in his hands will be held liable therefor. — *Garver v. Lisinger*, S. C. Ohio, Oct. 16, 1888; 18 N. E. Rep. 491.

23 ATTACHMENT—Error in Writ — Second Levy. —— That an attaching creditor, on discovering a clerical inaccuracy in his writ rendering it invalid, levied a second suit on the same goods, does not render the suing of the first writ wrongful, or destroy the basis for the second writ. — *Baines v. Ullman*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 543.

24. ATTORNEY—Judgment — Lien. —— Where a judgment has been collected, and the attorneys who collected it and have a lien on it, have notified the sheriff of their lien, he may retain the amount of the lien out of the money so collected, when the money is demanded by an assignee of the judgment. — *Gill v. Truelsen*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 254.

25. ATTORNEY—Lien—Embezzlement.——An attorney at law has a lien for a general balance of compensa-

tion upon money in his hands belonging to his client, and until such lien is discharged he is not liable to a prosecution for embezzlement of such money. — *Van Etten v. State*, S. C. Neb., Nov. 8, 1888; 40 N. W. Rep. 289.

26. BAIL—Right to—Homicide.——Deceased was shot from ambush and killed while being taken to jail. In his dying declaration he said he recognized defendants by the flash of their guns; there was evidence of previous ill-feeling and threats between them and deceased. The officer in charge of deceased saw no one near the place from which the shots were fired, and but the footprints of one person could be found: *Held*, on *habeas corpus* that they were entitled to bail. — *In re Smith et al.*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 359.

27. BANK — Paying Forged Check. —— A forged B's name to a note and mortgage, and procured a loan thereon, which was paid by check in favor of B. B's indorsement was forged to the note and A added his indorsement thereto: *Held*, that the bank was not protected by payment of the check. — *Atlanta N. Bank v. Burke*, S. C. Ga., Oct. 8, 1888; 7 S. E. Rep. 738.

28. BANKS AND BANKING—National Bank—Depositions —Evidence — Declarations — Review. —— A national bank can recover from a debtor a loan exceeding one-tenth of its paid up capital, although an act of congress prohibits such banks from making such loans to a single person of so large an amount. Rulings on the subject of depositions, the time of filing them, the admissibility in evidence of the admissions and declarations of the defendant, and on review. — *Corcoran v. Batchelder*, S. J. C. Mass., Oct. 22, 1888; 18 N. E. Rep. 420.

29. BANKRUPTCY—Title to Property—Presumption.—— Where the record in a bankruptcy case is silent as to the execution of an instrument of assignment of the bankrupt's estate, but shows that the bankrupt was subsequently discharged from his debts, it will be presumed that the instrument of assignment was executed. — *Hale v. Christy*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 295.

30. BASTARDY—Proceedings for Support— Laches.—— The fact that a prosecution under the bastardy act does not take place for more than four years after the birth of the child will not bar a recovery, when it clearly appears that the defendant is the putative father, that the mother from the first insisted that he was the father, and asked him to support the child, the parties in the mean time being on amicable terms.—*Denham v. Watson*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 308.

31. BILLS AND NOTES — Presentment for Payment — Excuse.——A, residing in Wisconsin, made his note in Minnesota to B, residing there, no place of payment being fixed. B indorsed the note to C, who resided in Minnesota, and knew that A resided in Wisconsin. Before the note fell due A removed to the city where C resided, but C was not aware of it: *Held*, that this excused the demand of payment so as to charge the indorser. — *Salisbury v. Bartleson*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 265.

32. BONDS—Forged Signatures — Sureties. —— When the name of one or more obligors in a bond has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the obligee accepted the instrument without notice of a forgery. — *Lombard v. Mayberry*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 271.

33. BOUNDARIES—Processioning— Report. —— When the report of the processioner and commissioners fails to state the dispute as to the boundaries, does not show any of the facts attending the survey nor the circumstances determining the conclusion at which they aimed, it is defective, under North Carolina law.—*Eulis v. McAdams*, S. C. N. Car.. Oct. 29, 1888; 7 S. E. Rep. 725.

34. BRIDGES — Repairs — Mandamus. —— *Mandamus* will not issue to a commissioner of highways, under Michigan laws, to repair a bridge, when he answers that in his opinion it will not cost more than $1,000, though affidavits accompanying the petition state that the cost will be less than that sum. — *Travis v. Skinner*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 234.

35. CARRIERS—Limiting Liability — Damages. —— A railroad company cannot by contract with a passenger, limit or exempt itself from liability for injuries resulting from its own negligence or the negligence of its servants. — *Mo. Pac. Ry. Co. v. Ivey*, S. C. Tex., Oct. 18, 1888; 9 S. W. Rep. 346.

36. CARRIERS—Passenger—Injury— Amendment — Assignment of Error—Verdict. —— Circumstances stated under which it was held that, in an action against a carrier by a passenger for injuries suffered by a collision, the judgment must be for the defendant, because the statements of the special verdict were irreconcilable. Ruling as to amendment of complaint, unless counsel in argument on appeal insists upon an assignment of error, it will be held to be waived. — *Grand Rapids, etc. Co. v. Ellison*, S. C. Ind., Nov. 14, 1888; 18 N. E. Rep. 507.

37. CARRIERS—Passengers—Negligence — Action.—— Where a passenger is killed by the collision of trains of different companies, an action may be brought jointly against both companies, whose concurrent negligence produced the accident. The negligence of the carrier, on whose train he was, is not imputable to him. — *Flaherty v. Northern P. R. R.*, S. C. Minn,, Nov. 7, 1888; 40 N. W. Rep. 160.

38. CHINESE—Exclusion Act of 1888 — Chinese Seamen. —— A Chinese laborer, who ships on an American vessel at an American port for a round voyage, and who does not land at any foreign port, but remains on board until the voyage is completed, does not depart from the United States, within the meaning of the exclusion act of Oct. 1, 1888.—*In re Jack Len et al.*, U. S. S. C. (Cal.), Oct. 24, 1888; 36 Fed. Rep. 441.

39. CHINESE—Exclusion Act of 1888— Construction.—— The Chinese exclusion act, approved Oct. 1, 1888, took effect from its passage, and it applies to all Chinese laborers who had departed from the United States, and had not in fact returned and arrived in the United States before the passage of the act. — *In re Chae Chan Ping*, U. S. C. C. (Cal.), Oct. 15, 1888; 36 Fed. Rep. 431.

40. CHINESE— Exclusion Act of 1888 — Departure.—— Chinese subjects purchasing through tickets and embarking in an American vessel, from an American port to another, who do not leave the vessel when she touches a foreign port, have not departed from the United States, within the meaning of the exclusion act of 1888. — *In re Tong Wah Sick*, U. S. C. C. (Cal.), Oct. 7, 1888; 36 Fed. Rep. 440.

41. COLLISION — Sailer and Steamer — Tow. —— A propeller towing five barges on Lake Huron met a schooner coming in an opposite direction, the latter tried to cut across the tow after having passed, at a safe distance: *Held*, that the schooner was solely at fault. — *The Page and Missouri*, U. S. D. C. (Mich.), Jan 18, 1888; 36 Fed. Rep. 329.

42. COMMISSIONS—Real Estate Agents.—— The broker is entitled to his commissions when he has procured a purchaser who is able, willing, and ready to complete the purchase upon terms mutually stipulated between the parties.—*Burke v. Cogswell*, S. C. Minn., Nov. 9, 1888; 40 N. W. Rep. 251.

43. CONFLICT OF LAWS—Death—Damages.—— Where a man's death, caused by the wrongful act of another, occurs in Arkansas, his widow cannot remove and dismiss an administration on his estate in that State, and sue in Texas for damages for his death, the laws of Arkansas and Texas being dissimilar on that subject.—*St. Louis, etc. R. R. v. McCormick*, S. C. Tex., Nov. 2, 1888; 9 S. W. Rep. 540.

44. CONTEMPT—Punishment—Imprisonment — Remission.——Defendant and his wife, during the reading of an opinion of the court in a proceeding to which they were parties, used profane, opprobrious and threatening language toward the court and officer, and violently resisted the latter in carrying out the orders of the court; defendant was sentenced to six months' imprisonment for contempt, and on a petition for re-

mission of his punishment the court held that his conduct was an indignanty and insult to the power and authority of the government, and the remission was refused.—*In re Terry*, U. S. C. C. (Cal.), Sept. 17, 1888; 36 Fed. Rep. 419.

45. CONTRACT—Construction.—— Where a purchaser of hotel furniture, etc., agreed to pay the debts of the seller connected with the hotel to the amount of about $23,500, he is bound to pay all those debts although they exceed that amount, and he had notice that the exact amount was not known.— *Delph v. Bartholomay, etc. Co.*, S. C. Penn., Oct. 26, 1888; 15 Atl. Rep. 871.

46. CONTRACT — Construction. —— Circumstances stated under which it was held to be error for the court to submit to the jury the construction of a written instrument, in which was embodied the terms of a contract for work. — *Spence v. Board of Commissioners*, S. C. Ind., Nov. 15, 1888; 18 N. E. Rep. 513.

47. CONTRACT — Construction — Conversations. —— Evidence of a conversation between the parties, as to how the work done under a written contract should be measured, is admissible, when the terms of the written contract are uncertain.—*Katz v. Bedford*, S. C. Cal., Nov. 1, 1888; 19 Pac. Rep. 523.

48. CONTRACTS— Description of Land. —— A description of land in an agreement to convey as five acres, lot 3, section 23, etc., there being nothing to show that five acres are intended, is not a good description, and the defect cannot be supplied by parol. — *Nippolt v. Kammon*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 266.

49. CONTRACT—Implied—Hiring. ——A was told by a railroad's civil engineer to look after the freight and about the station till the company discharged him. He did so. After an agent was appointed for the station, he told A he would write to the company and have his name put on the pay roll. A continued to work there: *Held*, that no cause of action was shown. — *Willis v. Toledo, etc. R. R.*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 205.

50. CONSTITUTIONAL LAW—Bills of Attainder— Banishment—Chinese.——A legislative act which undertakes to inflict the punishment of banishment or exile from the United States, on a citizen thereof, for any cause or no cause, or because of his race or color, is a bill of attainder within the prohibition of the constitution, and therefore void. — *In re Young Sing Hee*, U. S. C. C. (Oreg.), Oct. 10, 1888; 36 Fed. Rep. 437.

51. CONSTIUTIONAL LAW— Obligation of Contract.—— The act of 1886, providing for the election of directors of turnpike companies in which the State is interested, by the other stockholders with the approval of the commissioners of the sinking fund, being merely a waiver of the State's right, the resumption of the right under the act of 1888 does not impair the obligation of a contract.—*Cassell v. Lexington, etc. Co.*, Ky. Ct. App., Oct. 27, 1888; 9 S. W. Rep. 502.

52. COPYRIGHT — Exclusiveness — Book Construction. —— The grant of an "exclusive right to take orders for and sell" a book within a certain territory will not be construed as a covenant, that no other person shall sell the book in competition with the grantee, but only as a covenant that this shall not be done with the consent or concurrence of the grantor.—*Webster v. Ellsworth*, U. S. C. C. (Mich.), Feb. 21, 1888; 36 Fed. Rep. 327.

53. CORPORATIONS — Actions — Venue. —— Corporations must be sued at their domicil for damages arising from the passive breach of their obligations, such as negligence and non-feasance.—*Caldwell v. Vicksburg, etc. R. R.*, S. C. La., Oct. 9, 1888; 5 South. Rep. 17.

54. CORPORATIONS—Consideration — Mortgages — Priority. —— A mortgage of corporate property, to be thereafter acquired, takes effect as a valid lien immediately when the property is acquired by the mortgagor, and that, as between successive mortgages of after acquired property, priority of lien, is determined by priority of time; the mortgage first in point of time being the senior lien. — *Baston L. D. & T. Co. v. B. & M. Tel. Co.*, U. S. C. C. (N. Y.), Sept. 17, 1888; 36 Fed. Rep. 288.

55. CORPORATIONS—Denying Existence— Estoppel.—— Where defendant, a corporation, admits in its counterclaim, that it purchased the lumber, for the purchase price whereof the suit is brought, it is estopped to deny it made the contract because it was not then organized. —*Williams v. Stevens P. L. Co.*, S. C. Wis., Oct. 8, 1888; 40 N. W. Rep. 154.

56. CORPORATION—Negligence—Injury.—— An incorporated county fair is liable for negligence in the construction of its seats for injuries sustained by reason thereof by a person attending the fair.— *Dunn v. Brown, etc. Co.*, S. C. Ohio., Nov. 13, 1888; 18 N. E. Rep. 496.

57. COSTS—Attorney's Fee.—— A sold B certain guano in trust, the proceeds, when sold to be applied on B's notes held by A. B conveyed it to C in trust for certain creditors. C, having sold it, A sued him for the proceeds. The court, on judgment for A, allowed C his attorney's fee: *Held*, error.—*Chemical Co. v. Johnson*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 775.

58. COSTS—Security—Time of Motion.——The federal courts may require security for costs from solvent non-resident plaintiffs at any time, when no prejudice to plaintiffs' rights is shown to have resulted from defendant's delay in moving therefor.—*Stewart v. The Sun*, U. S. C. C. (N. Y.), Aug. 31, 1888; 36 Fed. Rep. 307.

59. COURTS—Adjournment—Jury Term. —— Where a district judge adjourns by written order to the sheriff a regular term of the court, under Louisiana law, the first day of the actual session becomes the first day of the regular jury term for that month, under the law relative to the drawing of the grand jury.—*State v. Pate*, S. C. La., Oct. 17, 1888; 5 South. Rep. 21.

60. COURTS— Federal — National Banks — Receivers — Agents.——The federal courts have the same jurisdiction of suits by and against the "agents" who displace receivers of an insolvent national bank as they have of suits by and against "receivers" thereof, *i. e.*, without regard to citizenship or the amounts involved. — *McConville v. Gilmour*, U. S. C. C. (Ohio), Aug. 17, 1888; 36 Fed. Rep. 277.

61. COURTS—Federal—Action—Administrator. —— The fact that a citizen of another State is selected as administrator, for the purpose of conferring on the United States circuit court jurisdiction of an action to be brought by him, does not defeat that jurisdiction. — *Goff's Admr. v. Norfolk & W. R. Co.*, U. S. C. C. (Va.), Feb. 11, 1888; 36 Fed. Rep. 299.

62. COURTS—Federal—Jurisdiction—Non-resident.—— Suits in the United States circuit court cannot be instituted against a corporation created and having its principal office without the district where the suit is brought, and where these facts appear on the face of the petition the action may be dismissed on motion.— *Connor v. Vicksburg & W. R. Co.*, U. S. C. C. (Mo.), Oct. 5, 1888; 36 Fed. Rep. 273.

63. COURTS—Federal—Jurisdiction— National Banks—Receiver.——The receiver of a national bank may still maintain a suit in the United States circuit court without reference to the citizenship of the parties or to the amount involved to recover a claim due the bank.— *Armstrong v. Trautman*, U. S. C. C. (Ohio), May 31, 1888; 36 Fed. Rep. 275.

64. COVENANT—Breach — Ejectment. —— A covenant in an agreement between father and son, that the latter would give a home to his sister, does not vest in the latter such a title as will enable her to support an action of equitable ejectment. — *Harkins v. Doran*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 928.

65. CREDITOR'S BILL — Improvements on Another's Land. —— A owned a life estate in certain land with remainded to his daughter. B, the husband of the daughter, then insolvent, invested all his means in improving it with the knowledge and consent of the others: *Held*, that B's creditors were entitled to have the land rented out, and the annual rent, to the extent of its enhancement by reason of the improvements, applied to their debts until satisfied. — *Newcomb v. Phillips*, Ky. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 529.

66. CRIMINAL LAW — Absence from State — Evidence. ——The return of attachments for a witness, issued to every county in the State, not executed because no such person resided in those counties, is not sufficient evidence of his removal out of the State to render his deposition admissible in a criminal prosecution, under the Texas code. — *Martinez v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 356.

67. CRIMINAL LAW—Appeal—Jurisdiction. —— Under Crim. Code Ky. § 347, providing for appeals to the court of appeals only where the punishment exceeds $50 fine or thirty days imprisonment, the court has no jurisdiction where the fine is $25 and the imprisonment 10 days. — *Tankersly v. Commonwealth*, Ky. Ct. App., Sept. 15, 1888; 9 S. W. Rep. 702.

68. CRIMINAL LAW—Appeal—Record.——An appeal in a criminal case from an order denying a motion for a new trial will be dismissed, where the record does not show the grounds upon which the motion was made.—*People v. Lenon*, S. C. Cal., Oct. 30, 1888; 19 Pac. Rep. 521.

69. CRIMINAL LAW— Arson — Corroboration. —— The testimony of an accomplice that defendants burned the barn is sufficiently corroborated by evidence of threats by defendants against the owner of the barn.—*Commonwealth v. Chase*, S. J. C. Mass., Nov. 26, 1888; 18 N. E. Rep. 565.

70. CRIMINAL LAW— Assault and Battery — Evidence. —— Under the circumstances the question of unnecessary violence, by the defendant in arresting the prosecutor as an officer, should have been left to the jury.—*State v. Pugh*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 757.

71. CRIMINAL LAW — Assault with Intent to Kill — Instructions. —— A verdict of guilty of an assault with intent to commit murder will not be set aside for errors in the charge, where the evidence shows the offense to have been so wanton and inexcusable that no other verdict could have been rendered.—*Sumby v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 737.

72. CRIMINAL LAW—Bailiff—Jury-room.—— Where a bailiff remains in a room with the jury during the time such jury are considering their verdict in a criminal case, it is sufficient to vitiate the verdict. — *Gandy v. State*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 302.

73. CRIMINAL LAW—Burden of Proof—Instructions.—— It is error to refuse an instruction, that the burden of proof never shifts from the State to defendant, but rests on the State throughout.—*Phillips v. State*, Tex. Ct. App., Oct. 24, 1888; 9 S. W. Rep. 557.

74. CRIMINAL LAW — Burglary — Possession of Goods. ——On an indictment for burglary, evidence that the stolen articles were found the next morning in the possession of the defendant, who gave a false account as to how he obtained them, is sufficient to warrant a conviction.—*Wynn v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 689.

75. CRIMINAL LAW— Carrying Concealed Weapons.—— On a trial for carrying a pistol concealed, where witnesses testify that they saw defendant draw a pistol from his hip pocket, and one of them states what kind of a pistol it was, there is sufficient evidence to authorize a jury to convict. — *Kinnebrew v. State*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 691.

76. CRIMINAL LAW—Change of Venue— Prejudice.—— In contesting a change of venue in a criminal case, on the ground of prejudice, the State, under Texas law, is not limited to impeaching the credibility of the witnesses, but may show that no such prejudice in fact exists.—*Mealy v. State*, Tex. Ct. App., Oct. 27, 1888; 9 S. W. Rep. 563.

77. CRIMINAL LAW — Continuance — Absent Witness. ——The party injured testified that his wounds were inflicted by the defendant, and denied that he had stated that one J had inflicted them as testified to by three witnesses. It appeared that J was present at the affray: *Held*, that defendant was entitled to a continuance to procure J's evidence. — *Brooks v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 355.

78. CRIMINAL LAW—Continuance—Confession of Error ——Where evidence, for the absence of which a continuance is asked, is material, and the continuance is refused, and confession of error therein is made by the State, the judgment on conviction will be reversed. — *Spear v. State*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 358.

79. CRIMINAL LAW—Conviction of Lesser Offense.—— Under an information charging the statutory offense of assault with intent to commit murder, a conviction may be had for assault with intent to do great bodily harm less than murder. — *People v. Prague*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 243.

80. CRIMINAL LAW— Evidence — Accomplice. —— An accomplice jointly accused with others, but discharged under a *nol pros.*, is a competent witness. The trial judge cannot be required to instruct the jury to discredit his testimony unless corroborated by unimpeached evidence, nor to charge the legal maxim—*falsus in uno, falsus in omnibus*. — *State v. Banks*, S. C. La., Oct. 10, 1888; 6 South. Rep. 18.

81. CRIMINAL LAW—Forgery— Instrument. —— If the instrument is absolutely void upon its face, it cannot be made the subject of forgery; but if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery.—*Hendricks v. State*, Tex. Ct. App., Oct. 17, 1888; 9 S. W. Rep. 555.

82. CRIMINAL LAW — Forgery — National Banks. —— Where the president and cashier of a bank, with intent to deceive the United States bank examiner, forge a promissory note, and enter it upon the books of the bank as assets, the State court has jurisdiction to try them for the forgery.—*State v. White*, S. C .N. Car., Nov. 5, 1888; 7 S. E. Rep. 715.

83. CRIMINAL LAW—Indecent Assault—Child.——Under Minnesota law, the taking of indecent liberties with or on the person of a female child under the age of ten years, without regard to whether she consents to the same or not, constitutes an assault. —*State v. West*, S. C. Minn., Nov. 2, 1888; 40 N. W. Rep. 249.

84. CRIMINAL LAW—Instruction—Evidence.—— Where the evidence relied on to convict of theft is wholly circumstantial, failure to instruct the jury in regard to the law applicable to such evidence is reversible error.—*Williard v. State*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 358.

85. CRIMINAL LAW—Justice of the Peace—Certiorari.—Under Michigan law, the justice's return in a criminal case of what he knows officially must determine the result of *certiorari*.—*People v. Etter*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 241.

86. CRIMINAL LAW—Larceny—Conversion by Bailee.—Defendant borrowed a horse in the Indian Territory, and brought it into Texas, where he sold it, without the owner's consent, with the fraudulent intent to convert it to his own use: *Held*, that he was guilty of theft, under Texas law.—*Brooks v. State*, Tex. Ct. App., Oct. 20, 1888; 9 S. W. Rep. 562.

87. CRIMINAL LAW—Larceny—Embezzlement.—— On a trial for larceny, if the facts warrant it, the jury may, under Louisiana law, return a verdict of embezzlement. —*State v. Williams*, S. C. La., Oct. 6, 1888; 5 South. Rep. 16.

88. CRIMINAL LAW—Larceny—Evidence.——Evidence that defendant shot and wounded another's hog and pursued it some distance, but did not kill or catch it, and that the owner afterwards found the hog badly wounded, and killed it and used the meat, does not show a taking warranting a conviction for theft.—*Minter v. State*, Tex. Ct. App., Oct. 24, 1888; 9 S. W. Rep. 561.

89. CRIMINAL LAW—Larceny—False Representations. ——One who obtains possession of goods by falsely representing himself to be purchasing as agent of another, to whom the goods are charged, and sells them, appropriating the proceeds, is guilty of larceny.—*Harris v. State*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 689.

90. CRIMINAL LAW—Limitations—Commencing Prosecution.——A complaint before a justice, charging a person with crime, on which a warrant is not issued

and placed in the hands of an officer for service until after the expiration of the statutory period, is not a commencement of prosecution so as to prevent the statute of limitations from running.—*People v. Clement*, S. C. Mich., Oct. 28, 1888; 40 N. W. Rep. 190.

91. CRIMINAL LAW—Malicious Mischief—Inference.—In a prosecution for maliciously injuring a house, under Michigan law, malice may be inferred from the nature of the injuries done to the house.—*People v. Burkhardt*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 240.

92. CRIMINAL LAW—Manslaughter—Abortion—Indictment.—An indictment for manslaughter by committing an abortion, resulting in death, is not defective, in failing to aver that the deceased was quick with child.—*Peoples v. Com.*, Ky. Ct. App., Oct. 27, 1888; 9 S. W. Rep. 509.

93. CRIMINAL LAW—Misconduct of Jury.—The testimony of a juror is inadmissible to show misconduct of the jury.—*State v. Harper*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 730.

94. CRIMINAL LAW — Misdemeanor — City Court.—Under Georgia law, where a railroad car is entered and something stolen therefrom, but it does not appear that defendant broke open the car, or that it was broken open at all, a conviction in the city court of Atlanta is proper.—*Burley v. State*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 693.

95. CRIMINAL LAW—Murder—Instruction. — An instruction in a murder case that, if the provocation was slight and the defendant used excessive force out of all proportion to the provocation, the killing would be murder, is correct.—*State v. Ellis*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 704.

96. CRIMINAL LAW — Prosecuting Attorney — Misconduct.— A verdict of assault before a justice of the peace will be reversed where, after the jury has reported they are unable to agree, the prosecuting attorney is allowed against defendant's objection to instruct them on the law.—*People v. Hicks*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 244.

97. CRIMINAL LAW—Sufficiency of Evidence. — On appeal the court will not reverse the findings of the jury in a criminal case upon a question of fact, unless the verdict is so clearly and manifestly against the weight of evidence as to suggest the presumption that it was produced by influences other than a proper consideration of the testimony.—*Robinson v. State*, S. C. Fla., Oct. 8, 1888; 5 South. Rep. 6.

98. CRIMINAL LAW—Two Counts—Sentence.—Where defendant is indicted in separate counts for burglary and larceny, and pleads guilty as charged, he may be sentenced for both, the term of the latter sentence beginning on the termination of the other.—*State v. Robinson*, S. C. La., Oct. 12, 1888; 5 South. Rep. 20.

99. CRIMINAL LAW — Verdict — Defective Count.—Where two counts in an indictment charge an offense in different degrees, and one of them is defective, but is not demurred to, a general verdict of guilty will be referred to the good count and the conviction sustained.—*May v. State*, S. C. Ala., July 26, 1888; 5 South. Rep. 14.

100. CUSTOM AND USAGE—Knowledge of Parties.—A building contract provided that the house was to be built of bricks at so much per thousand, wall count, solid measure: *Held*, that the universal meaning of these words among brick masons and contractors was admissible in evidence, and it was no defense that defendant did not know their meaning.—*Long v. Davidson*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 758.

101. DAMAGES—Measure—Failure to Take Goods.—Where A delivered corn under contract on the river bank for B, who failed to remove it, and it was destroyed by a flood, it was held that the measure of the damages was the value of the corn. — *Monarch v. Matthews*, Ky. Ct. App., Oct. 25, 1888; 9 S. W. Rep. 500.

102. DAMAGES—Negligence—Railroad.—To entitle a plaintiff to recover damages, under the Texas statute, against a railroad for the death of a relative, it devolves on him to prove that the death, when caused by the neglect of the servants, etc., was by their gross negligence; ordinary neglect is insufficient to hold the company.—*Mo. Pac. R. Co. v. Hill*, S. C. Tex., Oct. 16, 1888; 9 S. W. Rep. 351.

103. DAMAGES— Unliquidated — Interest. — Where the damages are unliquidated and the existence of a claim cannot be determined before verdict, it is error to charge that plaintiff should have interest from the time the last expense was incurred.—*Coburn v. Muskegon B. Co.*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 198.

104. DEDICATION—Tenants in Common.—A tenant in common cannot dedicate the common property to public use, as for a street, without the consent of his cotenant.—*City of St. Louis v. Laclede Gas Co.*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 581.

105. DEPOSITIONS—Foreign Suit—Letters Rogatory.—Letters rogatory, issued by a district judge in Mexico, for the purpose of clearing up the details of a certain importance, concerning smuggling certain cotton, do not show that the proceedings amount to a suit as contemplated by act of congress, and do not warrant the issuing of an order to take testimony therein.—*In re Letters Rogatory, etc.*, U. S. C. C. (N. Y.), Aug. 1, 1888; 36 Fed. Rep. 306.

106. DESCENT AND DISTRIBUTION—Widow—Purchaser.—Where a widow has selected the personal property of her deceased husband, allowed her by law, and has sold it, and after her death the probate court has sanctioned her selection and allowed the property to her vendee, the latter is entitled to it.—*Benjamin v. Laroche*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 156.

107. DEVISE — Devisees — Accounting. — Where a testator devised land severally to his wife and mother, charging the lands of each with the payment of debts, and each of them paid some debts, the wife paying the most, and she released to the mother for a valuable consideration all claims upon her: *Held*, that the mother's liability to the wife was thereby extinguished.—*Burkam v. Hayes*, S. C. Ind., Nov. 14, 1888; 18 N. E. Rep. 511.

108. EASEMENT—Implication—Breach.—The grantee in a deed of land, on which is a mill and dam embracing an easement as to ponded water occasioned by such dam over the adjoining land of another person, although such easement is not expressly mentioned in the deed.—*Bowling v. Burton*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 701.

109. EJECTMENT—Administrator—Heir.—Ejectment does not lie in behalf of an heir as against an administrator for land, to which the latter is entitled as an asset of the estate, but the administrator is not entitled as against the heirs to the possession of the intestate's homestead.—*Bârco v. Fennell*, S. C. Fla., Oct. 8, 1888; 5 South. Rep. 9.

110. EJECTMENT—Authority of Attorney.— An attorney for defendant in an action of ejectment has authority to bind his client by a stipulation to dismiss a demand by defendant under the statute for a second trial.—*Bray v. Doheny*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 262.

111. EMINENT DOMAIN — Benefits. — In awarding compensation for land taken by the United States for public buildings, benefits to the community at large should not be considered, but if the land has a special value to the owner which can be measured by money, he is entitled to have such value estimated.—*In re Rugheimer*, U. S. D. C. (S. Car.), Oct. 19, 1888; 36 Fed. Rep. 376.

112. EMINENT DOMAIN — Compensation. — Appropropriation of land for a public street without first making compensation therefor is contrary to the United States constitution, although the law provides that such damages shall be assessed to the remaining land of the owners.—*Scott v. City of Toledo*, U. S. C. C. (Ohio), Sept. 28, 1888; 36 Fed. Rep. 385.

113. EMINENT DOMAIN — Compensation. — Where real estate has been condemned for public use and damages awarded to the owner by a jury, and the only error assigned on appeal is that the verdict is excess-

ive, the supreme court will not ordinarily vacate or modify the verdict if based on testimony in the case.—*Omaha, etc. Co. v. Johnson*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 134.

114. EMINENT DOMAIN—Compensation—Evidence.—In proceedings to condemn a leasehold interest in land, where a real estate agent testifies that the leasehold is worth over $2,500 beyond the rent, but the owner himself testifies that the property is worth the amount of the rent, a verdict for $150 for loss of the lease, and $100 for expense of removal, is not opposed to the evidence.—*Becker v. Chicago, etc. Co.*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 564.

115. EMINENT DOMAIN—Constitutional Law.—The act of congress of August 1, 1888, conferring on the United States circuit court jurisdiction to condemn land for public buildings, on petition of the secretary of the treasury, is not void as in conflict with the constitutional provision that private property shall not be taken for public use without just compensation.—*In re Rugheimer*, U. S. D. C. (S. Car.), Oct. 15, 1888; 36 Fed. Rep. 369.

116. EQUITY—Creditor's Bill—Lis Pendens.—In a suit by a lien creditor to subject his debtor's real estate to the payment of the debt, an averment in the bill that there is then pending another suit by another creditor against the same, is not ground for demurrer.—*See v. Rogers*, S. C. App. W. Va., Sept. 15, 1888; 7 S. E. Rep. 436.

117. EQUITY—Equity Practice—Pro Confesso—Dismissal.—Where, after decree for want of a plea, answer or demurrer, an answer is filed, and motion made to strike off the decree, it is error to dismiss the bill at plaintiff's costs without disposing of that motion or taking any other action in the premises.—*Appeal of Cook*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 870.

118. EQUITY—Federal Courts—Judgments.—Federal courts have jurisdiction to relieve against a title fraudulently obtained by proceeding in a State court, by enjoining the assertion of the fraudulent title.—*Robb v. Vos*, U. S. C. C. (Ohio), Aug. 28, 1888; 36 Fed. Rep. 132.

119. EQUITY—Judgment Lien—Enforcement.—Plaintiff purchased land at an execution sale upon judgments against defendant. In an action for possession, defendant showed that the judgments were dormant and the executions irregular: *Held*, that the court, after setting aside the sale, could direct the sale of the land under the judgments.—*Carrie v. Clark*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 766.

120. EQUITY—Rescission—Partnership Relations.—The managing partner in a mine having actively concealed the fact from his copartner that valuable ore had been found, the latter being absent, and having misled him as to its true condition by letters, a sale by the latter to the former at a grossly inadequate price will be set aside as fraudulent.—*Bowman v. Patrick*, U. S. C. C. (Mo.), Sept. 17, 1888; 36 Fed. Rep. 138.

121. EQUITY—Rescission of Deed—Laches.—In an action to set aside a deed on the ground of fraud, under Kentucky law, it is incumbent upon plaintiff to prove, not only that he discovered the fraud within the last five years, but that he could not, with the use of ordinary diligence, have discovered the fraud until within the five years before the action was commenced.—*Woods v. James*, Ky. Ct. App., Nov. 1, 1888; 9 S. W. Rep. 513.

122. ERROR—Writ of—Auditors—Appeal.—A writ of error does not lie to the court of common pleas on an appeal from a township auditor's report, on a school district treasurer's account.—*Mohney v. School District*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 891.

123. ERROR—Writ of Error—Appellate Court.—Under the statute law of Illinois, a case in which less than $1,000 is involved cannot be taken by appeal or writ of error to the supreme court from the appellate court, unless the latter court, or a majority of its judges shall, within twenty days after the judgment is rendered, certify that it involves points of law worthy of the adjudication of the supreme court.—*MacLachlan v. McLaughlin*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 544.

124. ESTOPPEL—In Pais—By Silence.—A party who, knowingly, though it may be done passively, permits another to purchase land and expend money thereon under the supposition that he is the owner, and without such party making known his own claim, will not be permitted afterwards to exercise his legal rights against the purchaser.—*Forbes v. McCoy*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 132.

125. ESTOPPEL—Pledge—Conversion.—One who acquiesces in a pledge of commercial paper until a business venture, in which the pledge figures, turns out badly, will be estopped from asserting his ignorance of the transaction against the pledgee, who is an innocent purchaser for value.—*Gregory v. Safe Deposit Co.*, U. S. C. C. (Mass.), Oct. 5, 1888; 36 Fed. Rep. 408.

126. EVIDENCE—Best and Secondary.—In a suit on a note arising from a contract to saw lumber for a specified price per thousand, as evidenced by measurement of the same when shipped, evidence of what logs were cut, is inadmissible where the the lumber was measured both when loaded for shipment and when discharged.—*Eastman v. Cleaver*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 238.

127. EVIDENCE—Limitations—Burden of Proof.—Upon the issue of the statute of limitations, the burden of proof is on the plaintiff.—*Moore v. Garner*, S. C. N. Car. Nov. 5, 1888; 7 S. E. Rep. 732.

128. EVIDENCE—Lost Record.—The contents of a lost record may be proved by parol, but the witness must be able to speak of his own knowledge as to such contents.—*Appeal of Richards*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 903.

129. EVIDENCE—Witness—Leading Questions.—Upon a prosecution for selling intoxicating liquors, if the witnesses are manifestly unwilling to testify against the defendant, the court may well permit leading questions to be put to them by the prosecuting attorney.—*Commonwealth v. Chaney*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 572.

130. EVIDENCE—Writing—Parol Variance.—A written contract (an acceptance) cannot be varied by proof of a contemporary parol agreement importing conditions not expressed in the writing.—*Aultman v. Brown*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 159.

131. EXECUTION—Supplementary Proceedings—Complaint.—A statement in supplementary proceedings, that an execution had been issued against the defendant, but not stating to what county, is fatally defective.—*McKinney v. Snider*, S. C. Ind., Nov. 17, 1888; 18 N. E. Rep. 526.

132. EXECUTION—Wrongful Seizure—Judgment.—A judgment confessed under warrant of attorney, and an execution thereon, are no defense to an action for a seizure of goods thereunder, brought after the judgment and execution were set aside for irregularities, the judgment being for more than was due, and an affidavit of indebtedness having been filed.—*Anderson v. Sloane*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 214.

133. EXECUTORS—Foreign—Actions.—Personal representatives, appointed in Missouri, cannot sue for assets of their testator's estate, situate in Vermont.—*Allen v. Fairbanks*, U. S. C. C. (Vt.) Oct. 16, 1888; 36 Fed. Rep. 402.

134. EXECUTORS—Sales—Service on Devisee.—A special proceeding to sell land of a testator to pay debts against a devisee, who at the filing of the petition is a minor, but becomes of age before summons is served on him, and to which he puts in no answer, is at most only irregular.—*McIver v. Stephens*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 695.

135. EXECUTORS AND ADMINISTRATORS—Accounting—Attorney's Fees.—The allowance in an executor's account of attorney's fees to the amount of $1,150, the estate being of the value of $95,000, and consisting largely of judgments and mortgages, is not excessive.—

Appeal of St. Clair, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 914.

136. EXECUTORS AND ADMINISSRATORS — Compensation.——A public administrator is not entitled to compensation for services as an attorney rendered by him in the course of administration, in addition to his commissions.—*Loague v. Brennan*, S. C. Tenn., May 17, 1888; 9 S. W. Rep. 693.

137. EXECUTORS AND ADMINISTRATORS — Divorce — Dower—Caveat Emptor.——Where an executor sold the land of the decedent to pay his debts, and receives full value therefor, the purchaser being advised that he was getting a clear title, and part of the lands being afterwards assigned to the divorced wife of the decedent by the proper court: *Held*, that the purchaser could not recover from the executor any return of the purchase money to compensate him for the land so lost by the dower.—*Arnold v. Donaldson*, S. C. Ohio, Nov. 13, 1888; 18 N. E. Rep. 540.

138. EXEMPTION—Money Due—Schedule — Statute.——Construction of Illinois statutes exempting the property of debtors from execution. Ruling as to the exemption of money due to the debtor and the schedule to be filed by him.—*Finlen v. Howard*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 560.

139. FALSE IMPRISONMENT — What Constitutes — Evidence.——That one considers himself under arrest, without actual duress, is not sufficient to support a prosecution for false imprisonment.—*McClure v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 353.

140. FEES—Clerks of Court.—— Under Missouri law, the fees earned in each year in a circuit court are chargeable with a trust in favor of the clerk to the extent of his salary and the compensation allowed his deputies, and are to be applied in discharge of such trust whenever collected.—*Allen v. Cowan*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 587.

141. FENCES—Injuring.——A line of posts, on which slats were nailed, intended merely to keep travelers on the road from turning off on the fields, is not a fence, within the meaning of Code N. C. § 1062, about injuring fences.—*State v. Roberts*, S. C. N. Car. Nov. 5, 1888; 7 S. E. Rep. 714.

142. FRAUDULENT CONVEYANCE—Actions.——A debtor who without consideration has transferred checks to the defendants, and afterwards gone into insolvency, may sue defendants for the proceeds of the checks in order to pay into court their amount. — *Carill v. Emery*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 574.

143. FRAUDULENT CONVEYANCE — Insolvency — Evidence. —— Construction of Massachusetts statutes relative to insolvency. Circumstances stated to which were held to be sufficient evidence that the grantee of an alleged fraudulent conveyance had no knowledge that the grantor thereof was insolvent or was in contemplation of insolvency, said grantee having caused the paper to be prepared without consultation with the grantor.— *Perry v. Hadley*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 575.

144. FRAUDULENT CONVEYANCES — Return of Nulla Bona.—— Judgments against A returned *nulla bona* by the sheriff are sufficient evidence of insolvency to entitle the plaintiff to bring an action to set aside a conveyance as in fraud of the rights of creditors. — *Bates v. Cobb*, S. C. S. Car., Oct. 12, 1888; 7 S. E Rep. 743.

145. FRAUDULENT CONVEYANCES—Stock of Goods.—— A, being insolvent, sold his stock of goods, worth $900, to B for a horse worth $100, which he subsequently turned over to his creditors, and B's undertaking to pay debts owing by A amounting to $800: *Held*, that the transaction was not a fraud on A's creditors. — *Sweeney v. Conly*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 548.

146. FRAUDULENT CONVEYANCES— Withholding Deed—Record.——Withholding a deed of defeasance of deed absolute on its face, from record, by collision to prevent inquiry of creditors, renders the conveyance void as to the then existing creditors of the grantor. — *Ferguson v. Johnston*, U. S. D. C. (Miss.), June Term, 1888; 36 Fed. Rep. 134.

147. GRAND JURY—Prosecuting Attorney— Assistance. ——The State's attorney has no right to influence or direct the grand jury in their finding, or express any opinion on questions of fact, yet he may assist them in their labors, and they may call on him for advice on questions of law and procedure. — *State v. Adam*, S. C. La., Oct. 17, 1888; 5 South. Rep. 30.

148. HEALTH—Quarantine — Vessels. —— The county boards of health are authorized, under Florida laws, to make charges against a vessel for quarantine services, if under the authority given by the act of 1883 they have made proper provision therefor. — *Ferrari v. Board of Health*, S. C. Fla., Oct. 9, 1888; 5 South. Rep. 1.

149. HIGHWAYS—Court of Quarter Sessions. —— Construction of statutes of Pennsylvania with reference to highways and the jurisdiction and procedure of the court of quarter sessions on that subject. — *In re Road in Whiteley Tp.*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 895.

150. HIGHWAYS— Injunction. —— Where one builds his house on the land which he knows will be taken for a highway, he can have no injunction against its establishments, nor any relief in equity; he will be left to his remedy, if any, at law.—*Verga v. Miller*, N. J. Ct. Chan., Nov. 10, 1888; 15 Atl. Rep. 835.

151. HOMESTEAD — Assignment — Report. —— If the execution debtor is dissatisfied with the assignment of homestead, he should move to set aside the report in the court which issued the execution and before a deed is executed. He cannot question the report in a collateral proceeding. — *Lallement v. Detert*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 568.

152. HOMESTEAD—Conveyance — Wife. —— One who owned land and was married before the adoption of the constitution of 1868, and who has never had the land allotted and set apart as a homestead, has the right to sell without the consent of his wife. — *Gilmore v. Bright*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 751.

153. HUSBAND AND WIFE—Deed—Blanks.——Where a wife executes a deed of her real estate and delivers it to her husband with power to fill in the grantee, the consideration and the date, for the purpose of enabling him to sell it, such deed duly filled up in the hands of a *bona fide* purchaser who purchased from the husband and paid him will be sustained. — *Reed v. Morton*, S. C. Neb., Nov. 7, 1888; 40 N. W. Rep. 282.

154. HUSBAND AND WIFE — Deed — Her Acknowledgment. —— Where a married woman acknowledges a deed, it is not necessary that her husband should have gone far enough away from her to leave her free to express to the clerk her desire with respect to the deed.—*Hall v. Castleberry*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 706.

155. HUSBAND AND WIFE—Judgment—Execution.—— An execution may issue on a judgment in favor of a wife against her husband without the husband's consent. — *Kinkade v. Cunningham*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 905.

156. HUSBAND AND WIFE— Limitation of Actions.—— Under the act of 1855 a married woman can sue, and the statute of limitations runs against her, though she was married while an infant and remained married till suit brought — *Douglass v. Douglass*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 177.

157. HUSBAND AND WIFE—Sale—Power—Payment.—— Where a husband sold his wife's land under authority from her and received in payment therefor his own note and the worthless note of a third person: *Held*, that such notes were not payment of the purchase money, and that the wife could recover the price of the land from the purchaser thereof.— *Runyon v. Snell*, S. C. Ind., Nov. 16, 1888; 18 N. E. Rep. 522.

158. HUSBAND AND WIFE— Separate Estate—Creditors. ——Real estate was purchased by a wife and paid for out of her separate earnings, and at her request conveyed to her minor child: *Held*, that a judgment creditor of the husband could not have it subjected to the payment of his judgment.—*Callahan v. Powers*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 292.

159. IMMIGRATION—Labor Contract—Clergyman. —— The defendant, a religious corporation, engaged an alien residing in England to come here and take charge of its church as pastor: *Held*, that it was liable to the penalty prescribed by act of Congress prohibiting the importation of aliens under contract to perform labor in the United States.—*United States v. Rector, etc.*, U. S. C. C. (N. Y.), May 21, 1888; 36 Fed. Rep. 303.

160. INSURANCE—Policy—Beneficiary. ——A policy of insurance, payable to the "devisees or heirs at law" of the insured, is payable to his widow if he dies intestate without children, she being his heir at law of personal property, under the statute of Illinois. — *Alexander v. Northwestern, etc. Co.*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 556.

161. INSURANCE—Premium — False Representation.—— An agent falsely asserted to A that a rival insurance company did not contain a certain provision contained in the policies of his company, and invited A to compare his contract with that of the other company, leaving his blank form for that purpose with A. A afterwards made application and was insured: *Held*, that A must pay the premium, notwithstanding such statement.—*American S. B. I. Co. v. Wilder*, S. C. Minn., Nov. 9, 1888; 40 N. W. Rep. 252.

162. INTOXICATING LIQUORS—Damages— Widow. —— Under Michigan laws of 1883, a widow has a right of action against the liquor-seller for the death of her husband caused by an intoxicated person.—*Brockway v. Patterson*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 192.

163. INTOXICATING LIQUORS—Defense — License. —— Act Pa. May 31, 1887, prohibiting the sale of intoxicating liquors to minors and persons of intemperate habits, operates on persons to whom licenses were already granted, under the liquor law of May 8, 1854.—*Commonwealth v. Sellers*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 891.

164. INTOXICATING LIQUORS — Illegal Sale — Evidence —— Circumstances stated, the evidence of which was held to be sufficient to be submitted to the jury on the question whether defendant was guilty of illegally selling intoxicating liquors.—*Commonwealth v. Buckley*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 571.

165. INTOXICATING LIQUORS—Illegal Sale — Master and Servant.——A servant may be guilty of the offense of illegally selling intoxicating liquors, if in the absence of the master he assumes control and sells such liquors. —*Commonwealth v. Brady*, S. J. C. Mass., Nov. 26, 1888; 18 N. E. Rep. 568.

166. INTOXICATING LIQUORS— Illegal Sale — Sentence. ——Under North Carolina law, where any county has provided for the working of convicts on the public roads, a person convicted in such county of unlawfully selling liquor on Sunday may be sentenced to imprisonment at hard labor upon the public roads. — *State v. Hicks*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 707.

167. INTOXICATING LIQUORS— Indictment. —— Where an indictment avers the illegal keeping of intoxicating liquors for sale, and not the maintaining of a tenement for that purpose, a variance as to the place is not material. — *Commonwealth v. Kern*, S. J. C. Mass., Nov. 26, 1888; 18 N. E. Rep. 566.

168. INTOXICATING LIQUORS—Judicial Notice.——The courts will take judicial notice that lager-beer, ale, porter, and any other liquor made out of malt, is malt liquor. — *Netts v. State*, S. C. Fla., Oct. 8, 1888; 5 South. Rep. 8.

169. INTOXICATING LIQUOR—Local Option Laws.——A local option law was adopted in a precinct in March, 1886. By act of legislature of March 20, 1887, the law was amended making the penalty more severe: *Held*, that the amended law did not apply to an offense committed in that precinct in December, 1887, it not having adopted the amended law.—*Lawhon v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 355.

170. INVENTIONS—Anticipation — Hat Machines. —— The second claim of patent No. 97,178, to R. Eickermeyer, for hat pouncing machine is valid, and anticipates the fifth claim of patent 220,889, to E. B. Taylor, for a similar device.—*Nat. Hat, etc. Co. v. Brown*, U. S. C. C. (N. J.), Sept. 25, 1888; 36 Fed. Rep. 317.

171. INVENTIONS—Composition Patents—Infringement ——A patent for a composition of matter is not infringed by another composition into which one of the ingredients named without restriction in complainant's claim does not enter, though in the specifications the use of such ingredient is stated to be for a particular use only.—*Otley v. Watkins*, U. S. C. C. (Ill.), Oct. 8, 1888; 36 Fed. Rep. 323.

172. INVENTIONS — Equity — Jurisdiction — Licensee— Royalties. —— Equity has jurisdiction of a bill by the owner of a patent to obtain an account of royalties due from a licensee, and an injunction against using the patent in defiance of the agreement of license. — *Ball Glove Fastening Co. v. Ball & Locket F. Co.*, U. S. C. C. (Mass.), Aug. 16, 1888; 36 Fed. Rep. 309.

173. INVENTIONS—Infringement—Dampers. ——Letters patent No. 335,080, to N. C. Locke for improvement in dampers, are not infringed by devices constructed after the Spencer patents of 1885 and 1886. — *Locke v. Smith*, U S. C. C. (Mass.), Aug. 27, 1888; 36 Fed. Rep. 310.

174. INVENTIONS — Infringements — Measure of Dam ages.——In a suit for the infringement of a patent for an improvement in pavements, the amount charged by defendant for pavements containing the improvements, more than for similar pavements which do not contain it, is the measure of profits for which he is liable.—*Vulcanite Par. Co. v. Am. A. S. P. Co.*, U. S. C. C. (Penn.), Oct. 8, 1888; 36 Fed. Rep. 378.

175. INVENTIONS — Novelty — Draft Equalizer. —— Patent No. 172,756, to R. M. Marvin for draft equalizer attachment to harvesters, etc., is valid, and was not anticipated by the Toof patent. —*Marvin v. Gatschall*, U. S. C. C. (Minn.), Sept. 25, 1888; 36 Fed. Rep. 314.

176. JUDGMENT — Collateral Attack — Fraud. —— A judgment in a special proceeding for the sale of land cannot be attacked for fraud in a collateral action; an independent action to set it aside is required.—*Spivey v. Harrell*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 693.

177. JUDGMENT—Equitable Relief — New Trial. —— A bill in equity to obtain a new trial will not be entertained on the affidavit of an important witness for the prevailing party impeaching his own testimony, when it appears he is an ignorant man, that he is in the employ of the opposite party, did not make the affidavit of his own free will, and that perjury cannot be well predicated upon it. — *Cleveland I. M. Co. v. Husby*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 168.

178. JUDGMENT — Res Adjudicata. —— A purchaser from plaintiffs, after judgment, for the recovery of land pending an appeal to the supreme court, of which the purchaser had notice, is bound by the judgment of reversals afterwards entered, although no appeal bond was given, nor *supersedeas* granted. — *Carr v. Cates*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 659.

179. JUDGMENT—Res Adjudicata—Consideration.—— A, the mortgagee, sued B, the mortgagor, for the recovery of the mortgaged property. B's defense was, that there was no consideration for the notes secured nor for the mortgage, and B obtained a verdict: *Held*, that this was no bar to a counterclaim based on such failure of consideration, in an action on the notes brought by A against B.—*Osborne v. Williams*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 165.

180. JUDGMENT—Res Adjudicata — Contract — Service. ——A having sued B on a contract of service, and having recovered therein, brought a second suit for alleged services since bringing the first suit: *Held*, that he could not recover, having exhausted his remedy by the first suit.—*Kahn v. Kahn*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 135.

181. JUDGMENT—Separate Trials — Setting Aside.—— In an action, where defendants were entitled to separate trials, judgment was taken by default against some of the defendants, and on a trial the other defendants were successful: *Held*, that setting aside the judgment

by default did not vacate the judgment in favor of the other defendants. — *Boone v. Halsey*, S. C. Tex., Dec. 20, 1887; 9 S. W. Rep. 531.

182. JUDICIAL SALE—Notice—Statute. —— Under the statute of Pennsylvania of April 18, 1853, a judicial sale, made without notice of any kind, of the land of a person who has not been heard from for seven years, conveys no title to the purchaser as against the owner who afterwards returns.—*Taylor v. Hoyl*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 892.

183. JURISDICTION — Conflicting — State and Federal Courts.——Where the jurisdiction of the circuit court of the United States has attached, in a suit on the ground of citizenship in another State, the right of the plaintiff to prosecute his suit in such court to a final determination, there cannot be arrested, defeated or impaired, by any subsequent action or proceeding of the defendant respecting the same subject-matter in a State court.—*Newland v. Terry*, U. S. C. C. (Cal.), Sept. 3, 1888; 36 Fed. 337.

184. JUROR—Expression of Opinion. —— The expression of opinion, which disqualifies a juror, is a fixed, deliberate and determined one, which will not yield to evidence.—*State v. Dorsey*, S. C. La., Oct. 22, 1888; 5 South. Rep. 26.

185. LANDLORD AND TENANT — Lease — Fraud — Evidence.——In ejectment by a lessee against his lessor, evidence that the plaintiff obtained the lease by means of false representations as to its terms, which were written by him and which defendant could not read, will sustain a verdict for defendant.—*Christie v. Blakely*, S. C. Penn., Oct. 19, 1888; 15 Atl. Rep. 874.

186. LARCENY—Possession—Evidence. —— An indictment for theft of cattle, alleging possession and ownership to be in S, is not sustained by proof that S, though the owner, the cattle were ranging in a county other than that of his residence, and had been under the control and management of B for about four years. — *Williams v. State*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 357.

187. LIEN— Farm Laborer — Complaint. —— The defects in a farm laborer's claim, filed with a justice of the peace, cannot be cured by obligations in the complaint, in an action to protect the alleged lien against a third party.— *Cook v. Cobb*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 700.

188. LIMITATIONS— Acknowledgment — Note. —— An indorsement made and signed by a debtor on a promissory note after it is barred in these words, "I hereby acknowledge the indebtedness of this note," takes the note out of the operation of the statute.— *Drake v. Sigafoos*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 257.

189. LIMITATIONS — Action Arising in Another State. ——An action against the maker of a note executed in California, who came to Kentucky before its maturity, where he has since resided and has not been in California again, does not come under Gen. St. Ky. ch. 71, art. 4, § 19, but, under the California law, providing that if defendant be absent when the cause of action accrues, suit may be brought within the time limited after his return.—*Templeton v. Sharp*, Ky. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 507.

190. LIMITATIONS—Adverse Possession—School Lands. ——Where land is certified to the State as school lands by the United States and patented by the State as such, but subsequently the United States cancels the selection and patents the land to the same person, who obtained patent from the State, the second patent is void, and the statute of limitations begins to run in favor of an adverse holder against the patentee from the date of the first patent. — *Daniels v. Gualala M. Co.*, S. C. Cal., Oct. 29, 1888; 19 Pac. Rep. 619.

191. LIMITATIONS—Fraud. —— An action for relief on the ground of fraud may be commenced within four years after discovery thereof or of facts sufficient to put a person of ordinary prudence on an inquiry, which if pursued would lead to such discovery. — *Heiman v. Davis*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 309.

192. LIMITATIONS—Nuisances—Sewers. —— An action for damages, both past and future, caused by the construction of sewers, must be brought within four years after the work is done, under Georgia laws. — *Atkinson v. City of Atlanta*, S. C. Ga., Oct. 10, 1888; 7 S. E. Rep. 692.

193. LIMITATIONS—Trusts — Resulting. —— The rule excepting cases of trust from the operation of statutes of limitation is not applicable to a mere resulting trust. —*Dob v. Wilson*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 161.

194. LIMITATION OF ACTION — Exceptions — Married Women.—— A married woman who is a *cestui que trust* of land, who has reconveyed to the grantor and whose deed has been invalid, may maintain an action for her interest, and she is not within the exception of the statute of limitation of April 22, 1856 — *Thompson v. Carmichael*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 867.

195. MALICIOUS PROSECUTION— Evidence. —— Where an agent is prosecuted for embezzement and acquitted, evidence that the check alleged to have been embezzled could not have been received by him, is sufficient to sustain a verdict in his favor in an action for malicious prosecution.—*Paddock v. Watts*, S. C. Ind., Nov. 15, 1888; 18 N. E. Rep, 518.

196. MARINE INSURANCE— Broker Contract. —— Concealment of material facts by a broker, employed by a party to effect insurance from an insurance company, will avoid a recovery. — *Humblet v. City Ins. Co.*, U. S. D. C. (Penn.), July 13, 1888; 36 Fed. Rep. 118.

197. MASTER AND SERVANT— Contributory Negligence. ——Where a section hand was injured in trying to remove some stones from a track by a train, he having acted under the order of his foreman, an instruction, that if the jury found that to obey was extrahazardous, but did not plainly imperil his life or limb, and that in obeying the order he was injured without negligence on his part, etc., he was entitled to recover, furnishes the proper limit to plaintiff's right to recover.—*Stephens v. Hannibal, etc. R. R.*, S. C. Mo. Nov. 12, 1888; 9 S. W. Rep. 589.

198. MASTER AND SERVANT—Discharge—Damages.—— On a trial for wrongfully discharging plaintiff before the end of his term, the recovery may embrace all the damages to the end of the term, when the trial occurs after such end, though the suit was brought prior thereto.—*Roberts v. Rigdon*, S. C. Ga., Oct. 8, 1888; 7 S. E. Rep. 742.

199. MASTER AND SERVANT—Risk.——Where an employee undertakes a hazardous employment, he is deemed to assume the risks of the same, so far as they are open to observation or are known to him.—*Woods v. St. Paul, etc. Co.*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 510.

200. MORTGAGE—Partnership—Firm Name.——In an action to foreclose a mortgage, it is no objection that the mortgage runs to a partnership in its firm name, and not to any individual name.—*Foster v. Trowbridge*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep 255.

201. MORTGAGE—Redemption—Decree. —— The decree on a bill to redeem mortgaged premises should not be for a strict foreclosure, but should direct a sale on failure to pay the redemption money.—*Meigs v. McFarlan*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 246.

202. MORTGAGE—Redemption — Laches. —— A *cestui que trust*, whose trustee had sold the trust security to innocent purchasers for full value, while the complainant was in the penitentiary, brought suit to have his claim therein established. It appearing, however, that he had delayed bringing suit for a period of seven years, while the purchasers were making extensive improvements on the property, his action was held to be stale and void of equity.—*Fraker v. Houck*, U. S. C. C. (Kan.), Oct. 16, 1888; 36 Fed. Rep. 403.

203. MORTGAGE—Surrender—Creditor. — - Where an equitable mortgagor accepts from the mortgagee an engagement to reconvey the land upon the payment by a certain time of the mortgage debt, but afterwards surrenders this engagement, accepting a lease from the

mortgagee, the relation of mortgagor and mortgagee is thereby terminated, and a junior judgment creditor of the mortgagor cannot subject the land to the payment of his debt.—*Seymour v. Mackay*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 552.

204. MORTGAGE—What are—Assignment. —— A land contract, which is assigned by a written assignment, absolute in form, but designed as a mere security for a debt, is but a mortgage, and when the debt is paid the lien of the assignee will cease, except it has been reassigned to an innocent party without notice.—*Lipp v. South Omaha, etc. Co.*, S. C. Neb. Oct. 31, 1888; 40 N. W. Rep. 129.

205. MUNICIPAL CORPORATIONS — Franchises — Collateral Attack.——A party indicted for assaulting the marshal of a city of the fourth-class, while the latter was attempting to arrest him, cannot attack the corporate capacity of the city to show that the marshal therefor was no officer.—*State v. Fuller*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 583.

206. MUNICIPAL CORPORATIONS—Nuisance — Damages. —— Where the firing of gunpowder is forbidden in a city, but the mayor is authorized to license it on certain occasions, the city is not liable in damages for injuries resulting from the firing of gunpowder by such licensee. Neither is the city liable in damages for failure to enact any particular ordinance.—*Wheeler v. City of Plymouth*, S. C. Ind., Nov. 16, 1888; 18 N. E. Rep. 532.

207. MUTUAL BENEFIT SOCIETY—Evidence—Agent.—— The declarations of the pay-master of a railroad company as to deductions made in the pay of an employee are not evidence against a mutual benefit society, of which the employee was a member. The pay-master is a servant, not an agent.—*Baltimore, etc. Co. v. Ohio, etc. Co.*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 885.

208. NATIONAL COURTS — Jurisdiction — Amount.—— The United States circuit courts have jurisdiction in cases arising under revenue laws, although the amount in dispute is less than $2,000.—*Ames v. Hager*, U. S. C. C. (Cal.), Sept. 17, 1888; 36 Fed. Rep. 129.

209. NEGLIGENCE— Contributory — Jury. —— In this case, where a servant sues his employer for injuries received, from all the circumstances of the case it was held that it was the province of the jury to decide as to the question of contributory negligence.—*Union P. R. Co. v. O'Hern*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 293.

210. NEGLIGENCE — Contributory Negligence — Gross Negligence. —— Where, in an action for damages caused by negligence, an instruction is given that if the defendant was guilty of gross negligence and the plaintiff of slight negligence, the latter could recover: *Held*, that the instruction was erroneous, in omitting to state that the plaintiff must have used due care.—*Willard v. Swanson*, S. C. Ill., Nov. 15, 1888: 18 N. E. Rep. 548.

211. NEGLIGENCE—Railroad—Walking on Track.—— Where one constructing a sewer in a tunnel enters the tunnel when the cars are running, there being a time specified for him to do his work when the trains are not running, and is injured, he cannot recover.—*Loeffler v. Mo. P. R. Co*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 580.

212. NUISANCE — Cemetery — Injunction. —— An injunction will be granted against the laying out of a cemetery, where the proposed cemetery is to be located on higher ground than surrounding dwellings, and the drainage from which would poison the wells and injure the health of neighboring residents.—*Jung v. Neraz*, S. C. Tenn., Oct. 16, 1888; 9 S. W. Rep. 344.

213. PARTITION—Attorney and Client—Appeal.——Allowances for counsel fees in partition cases, if regular upon the face of the record, will be presumed to be correct. An appeal does not lie from the court of common pleas in partition cases.—*Laird v. Walkinshaw*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 898.

214. PARTITION — Husband and Wife. —— Where a wife sues for partition of land, and her share is awarded to her husband, she cannot maintain an action to review the proceedings, and her husband holds the land for her benefit.—*Appeal of Barkley*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 896.

215. PARTITION—Limitation—Pleading — Adverse Possession.——One who has held adversely for twenty years, and pleads that fact in bar of an action for partition, is entitled to the benefit of his plea, although the statute applicable to the case is that which bars such a claim by adverse possession for fifteen years.—*McCray v. Humes*, S. C. Ind., Nov. 13, 1888; 18 N. E. Rep. 500.

216. PARTNERSHIP.——A contract by which one party was to receive $1.50 per foot for boring a well, and one-eighth of the leases held by the other party, subject to charges for expenses, etc., creates a partnership between them.—*Kifer v. Smyers*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 904.

217. PARTNERSHIP—Dissolution—Overpayment.——A partner who, upon dissolution of the firm, is paid a sum on account of partnership profits, afterwards found to be more than is due him, is chargeable with interest on the excess from its receipt.—*Atherton v. Cochran*, Ky. Ct. App., Nov. 1, 1888; 9 S. W. Rep. 519.

218. PARTNERSHIP—Holding Out—Third Parties.—— The person seeking to enforce a partnership liability against one who, though not a partner, allowed himself to be held out as such, must have acted in his dealings with reliance upon the existence of a partnership relation or responsibility.—*Brown v. Grant*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 268.

219. PAYMENT—Goods from Another—Jury.——An instruction that, an account for lumber received from another by the plaintiff, should not be allowed as a payment on the note sued on, unless plaintiff expressly so agreed, is erroneous, since the jury might so find from the facts and circumstances.—*Griffin v. Petty*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 729.

220. PHYSICIANS—Malpractice— Clairvoyance. —— One who holds himself out as a healer of diseases must, no matter to what particular school or system he belongs, be held to the duty of reasonable skill in the light of the present state of medical science.—*Nelson v. Harrington*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 228.

221. PILOTS—Speaking Vessel—Half Pilotage.——Asking the master of a vessel, which was about to sail, at the custom house, if he desired a pilot, and an answer that he did not know, is not such a speaking of a ship and decline of services as entitle a pilot to half pilotage. — *Freeman v. The Australia*, U. S. D. C. (Cal.), March 9, 1888; 36 Fed. Rep. 332.

222. PLEADING—Divorce—Adultery.——The charge of adultery, in an action for divorce, must generally state time, place and person, or, when called on, to make the pleading more definite, the party must show an excuse for not doing so.—*Freeman v. Freeman*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 167.

223. PLEADING—Failure to Demur—Waiver.——The answer to a complaint for possession of a machine, alleged that since suit brought plaintiff had agreed to sell defendant another machine, and to take in part payment the machine in controversy, and for breach of this contract claimed $500 damages, and asked that the prayer of the complaint be denied: *Held*, that by failure to demur plaintiff had waived the irregularity of such a defense, and that it arose after the suit was brought. —*Puffer v. Lucas*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 734.

224. PLEADING — Motion — Demurrer — Corporation — Mistake.——Indefiniteness in pleading should be corrected by motion, and not by demurrer. A corporation, unless specially authorized to do so, cannot subscribe to the stock of another corporation. A mistake of law with full knowledge of the facts, cannot entitle a party to relief. This rule is founded on public policy, and applies to corporations as well as individuals.—*Valley, etc. Co. v. Lake Erie, etc. Co.*, S. C. Ohio, Oct. 16, 1888; 18 N. E. Rep. 486.

225. PLEADING—Proof—Variance.——In an action for the recovery of the price of goods sold, proof that the purchase price was less than that alleged in the complaint, is not a material variance.—*Iverson v. Dubay*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 159.

226. PLEADING—Special Plea—Effect.——A defendant, who files a special plea, is to be judged on that plea, and none other; all else is admitted.— *State v. Hendricks*, S. C. La., Aug. 27, 1888; 5 South. Rep. 24.

227. PLEADING — Statement of Account. —— Under North Carolina law, a demand for a copy of the account alleged in the petition, is not authorized where plaintiff has attached a bill of particulars to his complaint, and made it a part thereof by reference.— *Wiggins v. Guthrie*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 761.

228. POOR—Settlement—Husband and Wife.——Under Wisconsin laws, relative to the support of paupers, a husband's settlement in the State is that of his wife, though she has been abandoned or voluntarily lives apart from him.—*Monroe Co. v. Jackson Co.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 224.

229. POOR AND POOR LAW—Borrowing Money.——Construction of poor laws of Pennsylvania. When overseers of the poor cannot borrow money for an emergency, so as to bind the district.— *Gibson v. Plumbcreek, etc. Co.*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 926.

230. PRACTICE—Demurrer to Evidence—Waiver.—— By putting in his evidence, after his demurrer to plaintiff's evidence is overruled, defendant does not waive his right to have the court's ruling reviewed, but he takes the chances of supplying by his own evidence any defects in the plaintiff's case.—*Erwin v. St. Louis, etc. R. R.*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 577.

231. PRACTICE—Dismissal—Notice.—— If an action is dismissed for want of prosecution without notice, the appellant may have the cause reinstated if application is made within a reasonable time, upon such terms as to payment of costs as may be right.—*Berggren v. Berggren*, S. C. Neb., Nov. 7, 1888; 40 N. W. Rep. 284.

232. PRACTICE—Misconduct of Jury—Evidence.—— Affidavits may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict. Members of the jury may testify as to any misconduct occurring in the jury room.—*Harris v. State*, S. C. Neb., Nov. 15, 1888; 40 N. W. Rep. 317.

233. PROCESS — Proof of Service — Presumption.—— Where the record of judicial proceedings states the manner in which the summons were served on a party beyond the jurisdiction of the court, it will not be presumed that other proof of service was made to the court than that so shown and recited in the judgment, nor that the court acquired jurisdiction, unless it is affirmatively shown.—*Godfrey v. Valentine*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 163.

234. PUBLIC LANDS—Railroads—Indemnity Belt.—— The act of congress of 1864, organizing the Northern Pacific R. R., and granting a certain number of alternate sections of land on each side of its line of road, and providing that for any lands coming within the description of the grant that have been sold or pre-empted other lands might be selected in lieu thereof, taken in connection with the resolution of 1870, gave the company an indemnity limit of ten miles.—*Northern Pac. R. Co. v. United States*, U. S. C. C. (Minn.), Oct. 17, 1888; 36 Fed. Rep. 282.

235. QUIETING TITLE—Equitable and Legal Title.—— Under California law, one who has an equitable interest in real estate, cannot sue the holder of the legal title for the purpose of determining such adverse claim.— *Von Drachenfels v. Doolittle*, S. C. Cal., Oct. 27, 1888; 19 Pac. Rep. 518.

236. RAILROADS — Fires — Evidence. —— Evidence in the case considered sufficient to justify the conclusion that a fire in an open field was caused by defendant's engine.—*Dean v. Chicago, etc. R. Co.*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 270.

237. RAILROADS — Negligence — Trespass. —— A railroad company is liable for injuring or killing a person, though he was wrongfully on the track, if it failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger and averted the calamity. — *Williams v. Kansas City, etc. R. Co.*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 573.

238. RAILROADS—Negligence of Engineer.——An engineer running an engine over a railway crossing, is not excused from ringing the bell or blowing the whistle by the fact that a train of cars standing on the main track obstructs the crossing.— *Brown v. Griffin*, S. C. Tex., Nov. 12, 1888. 9 S. W. Rep. 546.

239. RAILROADS—Taxation—Aid Bonds.——A railroad company which has purchased a road, to the capital stock of which a county has subscribed, is liable to taxation to pay the subscription only on improvements made since the purchase, and not are the value of the road when purchased.—*Louisville, etc. R. Co. v. Hopkins Co.*, Ky. Ct. App., Oct. 20, 1888; 9 S. W. Rep. 497.

240. RAILROAD COMPANY— Fences—Notice.——Where the owner of land grants a right of way through it to a railroad company and agrees in writing to fence the railroad on each side, such agreement not being upon record is no notice to a subsequent purchaser of the land, and he can require the railroad company to fence its track according to the laws of the State. — *Pittsburg, etc. Co. v. Bosworth*, S. C. Ohio, Nov. 13, 1888; 18 N. E. Rep. 533.

241. RECORDS—Police Jury — Collateral Attack. —— The minutes of a police jury are a public record, importing absolute verity, and cannot be contradicted in a collateral action, to which the members of the board are not made parties, nor in such action can their secretary be required to alter such minutes.— *State v. Simmons*, S. C. La., Sept. 15, 1888; 5 South. Rep. 29.

242. REMOVAL OF CAUSES — Separable Suit — Partnership.—— Case stated wherein the county finds but a single controversy and therefore not removable under the act of congress to the federal court at the instance of a non-resident corporation.— *Yearian v. Horner*, U. S. C. C. (Mo.), Sept. 26, 1888; 36 Fed. Rep. 130.

243. REMOVAL OF CAUSES—Time of Application.——A motion to remand a case to the State court will be sustained, where it appears that the petition and bond was not filed in the State court at the time defendant was by law required to answer or plead to the complaint, no extension of time having been granted by any rule or order of said court.—*Wedekind v. Southern Pac. Co.*, U. S. C. C. (Nev.), Oct. 1, 1888; 36 Fed. Rep. 279.

244. REPLEVIN—Writ—Statement of Value.——A summons from a justice of the peace to answer a complaint for the detention of a mule, without specifying its value, is insufficient, under North Carolina law.—*Leathers v. Morris*, S. C. N. Car., Nov. 18, 1888; 7 S. E. Rep. 783.

245. REVIEW—Appeal.——Where rulings of the court, and exceptions thereto, are not made part of the record, error cannot be assigned. An instruction that "mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence supports the allegations of the indictment, if it falls short of satisfying the jury beyond a reasonable doubt, that defendants are guilty, nor is it sufficient that upon the doctrine of chances it is more probable that defendants are guilty, though stating correct propositions of law, is argrimentative, and was properly refused.—*Burns v. People*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 550.

246. REVIEW—Appeal—Weight of Evidence. —— The Supreme Court of Illinois cannot review the findings of fact of the appellate court, but it can look into the bill of exceptions to see whether the judgment is supported by evidence sufficient for that purpose.—*Commercial, etc. Co. v. Scannon*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 562.

247. SALE—Action — Principal and Agent — Evidence. ——In an action for goods sold, the declaration of the agent of the purchaser that the goods had arrived but had not been received because his principal had rescinded the contract are admissible in evidence, and sufficient to establish the fact of the delivery of the goods. In such case it is error to direct a nonsuit. — *Sidney, etc. Co. v. School District*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 881.

248. SALES—Conditional—Waiver. ——In replevin for a piano by one claiming under foreclosure of a mortgage against the alleged vendor thereof on a conditional sale to the mortgagor, where it appeared that the mortgagor used the property and had possession of the room in which it was stored after his non-compliance with the conditions of such sale, it is proper to submit such circumstances by instructions to the jury as tending to show that the vendor had waived his rights. — *Begole v. Stone*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 171.

249. SALE—Warranty—Breach—Remedies. ——Plaintiff agreed to sell defendants certain printing presses and guaranteed that they should be "free from defective material or workmanship and do their work satisfactorily:" *Held*, that the defendants were bound to return the presses if not satisfactory, and that they could not recoup damages in an action for the price. — *Campbell Printing Press Co. v. Throp*, U. S. C. C. (Mich.), Oct. 16, 1888; 36 Fed. Rep. 414.

250. SEAMEN—Consular Officer—Discharge.——A consular officer of the United States may discharge a seaman on the application of the master, for any cause sanctioned by the usages and principles of the maritime law, as recognized in the United States, on the payment of the wages then earned, and all claim for wages during the remainder of the voyage is thereby cut off and barred.—*Rafferty v. Oakes*, U. S. C. C. (Oreg.), Oct. 18; 1888; 36 Fed. Rep. 442.

251. SHIPPING CHARTER PARTY—Breach—Joinder.—— In case of a breach of warranty of sea-worthiness in a charter party, an action for the recovery of the goods shipped and for damages for the breach of warranty may be joined. — *Balfour v. The Director*, U. S. C. C. (Oreg.), Oct. 9, 1888; 36 Fed. Rep. 335.

252. SHIPPING— Tort — Liability of Owner. ——The act of congress limiting the liability of ship owners to their interest in the vessel and pending freight, for torts, must be construed with reference to the subject-matter, for which relief may be granted in admiralty, and does not cover the destruction of property on land caused by or communicated from a vessel.—*Goodrich Trans. Co. v. Gagnon*, U. S. C. C. (Wis.), Aug. 18, 1888; 36 Fed. Rep. 123.

253. SPECIFIC PERFORMANCE—Parol Contract.—— Part performance of a parol contract to convey lands, is not in itself sufficient to take the same out of the statute of frauds, so as to authorize a specific performance.—*Blankenship v. Spencer*, S. Ct. App. W. Va., Sept. 19, 1888; 7 S. E. Rep. 433.

254. SPECIFIC PERFORMANCE — Parol Promise. —— Equity will decree specific performance of a promise by a father to convey land to a daughter, who on the strength thereof moved on it, improved it, erected buildings thereon and cultivated it.—*Burlingame v. Rowland*, S. C. Cal., Nov. 1, 1888; 19 Pac. Rep. 526.

255. SPECIFIC PERFORMANCE — Unilateral Contract — Pleading.——Unilateral contracts for the purchase of lands may be enforced by the vendor. In such case, the complainant not being bound, must show that he is not only willing to perform all the stipulations on his part, but that he has tendered himself ready to perform them before filing his bill. — *Miller v. Cameron*, N. J. Ct. Chan., Nov. 16, 1888; 15 Atl. Rep. 842.

256. STATUTES—Adverse Possession—Construction.—— Rev. Stat. Wis. §§ 1190, 4212, do not exclude other conditions of adverse possession not mentioned therein, nor the idea of adverse possession of a character other than those therein prescribed.—*Finn v. Wisconsin, etc. Co.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 209.

257. STATUTES—Warrants—Appropriations.——Under the act of 1887, for selling State lands in the city of Lincoln, $78,000 were realized, part of which was evidenced by notes due subsequently: *Held*, that by said act the $78,000 were absolutely appropriated, and warrants could be drawn thereon to carry into effect the purpose of the act.—*State v. Babcock*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 316.

258. STOWAGE—Shipping.——It is bad stowage, for which the carrier is liable, to place salt over iron and anvils, though crates of crockery be placed between them, and to place the salt, iron and crates within an inch or so of the mast.—*The Nith*, U. S. C. C. (Oreg.), Oct. 9, 1888; 36 Fed. Rep. 383.

259. SUBROGATION—Judgment. —— Where one buys land incumbered by two judgments, and pays money into court upon the senior judgment, he is entitled to be subrogated to the amount paid by him to the rights of the senior judgment creditor as against the junior judgment.—*Appeal of Sowers*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 898.

260. SUBROGATION —Sureties—Redemption — Laches—Mortgage.——Where a mortgaged is foreclosed, and a prior judgment creditor not made a party, sureties who have purchased the judgment and stood by while the purchaser at foreclosure sale made valuable improvements, are guilty of laches, and cannot be subrogated to the right to redeem of the judgment creditor.—*Thomas v. Stewart*, S. C. Ind., Nov. 13, 1888; 18 N. E. Rep. 505.

261. TAXATION—Assessment—Presumption.——In an assessment roll made by a township supervisor, under the Michigan law of 1882, it will be presumed that the property was assessed at its true cash value.—*Mills v. Township of Richland*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 183.

262. TAXATION—Corporations — Property. —— Under Kentucky law, the stock held by the members of a steamboat corporation is required to be listed, but not the specific property of the corporation.—*Louisville, etc. Co. v. Barbour*, Ky. Ct. App., Nov. 1, 1888; 9 S. W. Rep. 516.

263. TAXATION—Exemption. —— The property of a poor district in Pennsylvania is not liable to taxation for county purposes, it being held for the use of a public charity.—*Armstrong Co. v. Overseers*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 892.

264. TAXATION—Fraudulent Return — Complaint.—— Construction of Indiana statutes relative to taxation. What is a sufficient complaint to charge a false and fraudulent return of property liable to taxation.—*State v. Lauer*, S. C. Ind., Nov. 17, 1888; 18 N. E. Rep. 527.

265. TAXATION—Levy— Police Jury. —— Police jurors are, by Louisiana law, clothed with the optional power of levying or not, as in their wisdom they may deem fit and proper the tax for school purposes.—*Directors v. Police Jury*, S. C. La., Oct. 17, 1888; 5 South. Rep. 23.

266. TAXATION—Omitted—Penalties. —— The law of 1878, amended in 1881, providing for assessing taxes upon property for past years, which had not been assessed, does not authorize the including in such assessment of penalties for such years.—*State v. Winona, etc. Co.*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 166.

267. TAXATION—Sale—Purchaser as Trustee. ——Where the purchasers at a tax-sale, at the request of one pretending to be desirous of purchasing the property for the owner, decline to bid, and the land is struck off to him for a nominal sum, and he afterwards transfers to another by quitclaim deed, such title so conveyed is void against the owner in possession.—*Merrell v. Poulter*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 586.

268. TAXATION—Tax-sale—Mistake.—— Circumstances stated under which it was held that where a tax-payer fails to pay his taxes by reason of mistake in the assessment and the land is thereupon sold: *Held*, that the sale is void. — *Freeman v. Cornwell*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 873.

269. TAXATION—Tax-title—Tax-roll.——Where a tax-roll contains no certificate from the supervisor, and it is not shown that leaves claimed to have been cut from the roll contained such certificate, a sale based thereon is void.—*Newkirk v. Fisher*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 189.

270. TELEGRAPH COMPANY—Failure to Deliver Message —Penalty. —— The act of Indiana forbidding telegraph companies to discriminate in their charge does not impose a penalty for mere negligence in the delivery of messages. — *Western, etc. Co. v. Jones*, S. C. Ind. Nov. 15, 1888; 18 N. E. Rep. 529.

271. TENANTS IN COMMON — Co-tenants — Rents and Profits.——A tenant in common who uses the estate to pasture his cattle is liable to his co-tenant for the latter's share of the value of such pasturage. — *West v. Weyer*, S. C. Ohio, Nov. 13, 1888; 18 N. E. Rep. 537.

272. TOWAGE—Negligence.——An unreasonable delay in sending a larger tug to take a tow of logs from a small tug engaged to bring the tow in deep water, during which time there were several logs lost from the raft, renders the tug liable for such loss. — *Wilson v. Sibley*, U. S. D. C. (Ala.), Oct. 17, 1888; 36 Fed. Rep. 379.

273. TRADE-MARKS — Design Patent Expiration. —— Design patent No. 3,939, to H. Conant for embossing numbers, etc., on thread spools, having expired after seven years' duration, the same is common property; the law does not extend such beyond their terms.—*Coats v. Merrick T. Co.*, U. S. C. C. (N. Y.), Sept. 28, 1888; 36 Fed. Rep. 324.

274. TROVER—Live Stock—Damages.——In trover for a cow, wherein the plaintiff prevails, he is entitled to a return for the animal with its increase, or in the alternative to the value thereof.—*Morris v. Colum*, S. C. Tex., Oct. 16, 1888; 9 S. W. Rep. 345.

275. TRUSTS—Implied—Attorney. —— One who procures an assignee in insolvency, the creditors and the debtor at a public sale for a nominal sum, by advising them as their attorney that thereby a sacrifice will be prevented, and by orally promising them to hold it and manage it till it can be sold more advantageously, holds it in trust for such parties.—*Broder v. Conklin*, S. C. Cal., Nov. 12, 1888; 19 Pac. Rep. 513.

276. UNDUE INFLUENCE — Cancellation of Deed. —— Where an old man, infirm and weak of mind, conveys land to a girl thirteen years of age, and the only consideration therefor is an alleged injury to her by an assault and battery, which was committed in the presence of the girl's mother without her objection or disapproval, and the mother has threatened him therefor, the deed will be set aside as obtained by undue influence.—*Goodrich v. Shaw*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 187.

277. USURY—National Banks. —— Under act of congress of June 3, 1864, a sum reserved by a national bank out of the money loaned, greater than the legal interest till the note matures, is forfeited, and also the interest accruing by law upon non payment after maturity. —*Aives v. Henderson N. Bank*, Ky. Ct, App., Oct. 30, 1888; 9 S. W. Rep. 504.

278. USURY—Recovery.—— Where a note given in renewal of another note is in excess of the principal and legal interest then due, the excess is not recoverable. If usurious interest has been paid, it cannot be recovered.—*Webb v. Bishop*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 698.

279. VENDOR AND VENDEE — Contract — Special Warranty.——A contract to "sell and convey" land "by a deed of warranty" is complied with by the delivery to and acceptance by one of the three vendees of a deed of special warranty.—*Payne v. Echols*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 895.

280. VENDOR AND VENDEE—Defective Title. —— Where the vendee of land retains part of the purchase money until the vendor shall procure releases of outstanding claims upon the land, and the vendor performs in part his contract, the vendee procuring part of his releases: *Held*, that the vendor is entitled to recover the portion of the money so retained which is covered by the releases which he has procured. — *Appeal of Gansz*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 883.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES ANSWERED.

QUERY NO. 15 [*27 Cent. L. J. 612.*]

A and B agreed to run a horse race for $500 a side, the winner to take the whole. The race was run. A's horse won. After the race, but before the money was paid over by C (the stakeholder), B demanded his $500; C refused to pay to him, but paid the whole $1,000 to the winner, A. B brought suit against C, the stakeholder, to recover his $500. C answered, setting up the above facts, and alleged that B agreed to abide the decision of the judges of the race; that the race was won by A, and was so decided by said judges, and after said decision in A's favor, C held the money when B's demand was made, as the money of A. To this answer B demurred. The circuit court at Portland, Oreg., sustained the demurrer, holding "that, notwithstanding the statutes of Oregon are silent on the subject, the 'wager' is illegal, and contrary to public policy. That demand being made before the money was actually paid over, though after the event, B could recover." Please cite authorites holding: 1st. That in the absence of any statute to that effect, the "wager" is not illegal or against public policy. 2d. That after the event (*i. e.*, after the race was run and decided), it is loo late to rescind or recover the money staked and lost. On the second proposition New York, Texas and California have so held as to election bets.

N. H. B.

Answer. Contracts of wager are valid at common law, unless they are affected with some special cause of invalidity. When, therefore, no statutory prohibition intervenes, a bet on the result of a horse race, etc., may be recovered by the winner. The tendency of the later American decisions, however, is to treat all gaming contracts and wagers as void, regardless of the absence of statutes on that subject. The decisions *pro* and *con* are too numerous to be mentioned here, but they are cited in the following authorities. viz: Goodsall v. Boldero, 2 Smith's Lead. Cas. (8th Am. ed. 316-319; 7 Wait's Act. & Def. 83-91. T.

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